Supreme Court, U.S.
FILED

061028 NOV 10 2006

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

RALPH DANIEL MARTINEZ
Petitioner

VS.

THE STATE OF CALIFORNIA
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT DIVISION 2

Barry O. Bernstein*
Law offices of Barry O. Bernstein
3727 W. Magnolia Street #767
Burbank, Ca 91510
Tel. 818-558-1717
Attorney for Petitioner
Ralph Daniel Martinez
*Counsel of Record

QUESTION PRESENTED

Whether California's requirement that a suspect subjected to custodial interrogation must clearly invoke his right to silence violates due process of law and is contrary to the Fifth and Fourteenth Amendment protections expressed in *Miranda v. Arizona.*

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT DIVISION 2 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6
CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S REQUIREMENT THAT A SUSPECT IN CUSTODY MUST AFFIRMATIVELY AND CLEARLY INVOKE HIS RIGHT TO SILENCE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS 6
A. Introduction 6
B. California's *Miranda* jurisprudence directly contravenes this court's precedents and must be corrected to avoid further due process violations 9
C. Certiorari is required because there is a split among the circuits and within the state courts whether defendants must clearly invoke the right to silence 14
D. Certiorari of petitioner's case is necessary because the California court improperly decided that petitioner's confession was voluntary 17
CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante 550 U.S. 938 (1991) 4
Arnold v. Runnels 421 F.3d 859 9th Cir. 2005). 11
Colorado v. Connelly 479 U.S. 157 (1986), 13,15
Colorado v. Spring 479 U.S. 564 (1987) 4
Davis v. United States (1994) 512 U.S. 452, 459 8, passim
Hopper v. Dretke 106 Fed. Appx. 221,(5th Cir. 2004), 11
Hutto v. Ross, 429 U.S. 28, (1976); 15
Mincey v. Arizona, 437 U.S. 385 (1978)). 15
Miranda v. Arizona 384 U.S.434 (1966) 4, passim
Mohn v. Bock 208 F. Supp. 796 (E.D. Mich. 2002). 11
Oregon v. Elstad, 470 U.S. 298 (1985) 15
People v. Crittenden 9 Cal.4th 83 (1994), 10
People v. Michaels 28 Cal.4th 486, 510 285] (2002) 10
People v. Peracchi (2001) 86 Cal.App.4th 353 8
People v. Stitely 35 Cal.4th 514, 535(2005).) 8
People v. Storm 28 Cal.4th 1007 (2002) 11
Rhode Island v. Innis 446 U.S. 291, 301(1980.) 11
Schneckloth v. Bustamonte, 412 U.S. 218, (1973) 15
South Dakota v. Neville 459 U.S. 553. (1983). 12
Texas v. Cobb 532 U.S. 162,176 (2001) 12
United States v. Braxton, 112 F.3d 777, (4th Cir.1997). 15
United States v. Dodier, 630 F.2d 232, 236 (4th Cir.1980) 15
United States v. Johnson, 495 F.2d 378, 382-83 (4th Cir.1974) 15
United States v. Mickell 102 F.3d 470 (11 Cir. 1996). 11

United States v. Rambo 365 F.3d 906 (10th Cir. 2004).) 12
United States v. Wertz, 625 F.2d 1128, 1133-34 (4th Cir.1980) 15
Van Hook v. Anderson 444 F.3d 830 (6th Cir. 2006). 11

Statutes
Pen. Code,§§
1192.7, subd. (c)(8 2
12022.53, subd. (d), 2
187 2

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT DIVISION 2

Petitioner Ralph Daniel Martinez prays that a writ of certiorari may issue to the review the unpublished decision of the California Court of Appeal entered May 8, 2006.

OPINIONS BELOW

The Court of Appeal issued its unpublished opinion on May 8, 2006. A copy of that opinion is attached as Appendix B. The California Supreme Court denied review on August 16, 2006. A copy of that document is attached as Appendix B.

JURISDICTION

The California Supreme Court denied discretionary review on August 16, 2006. This court has jurisdiction pursuant to 28 U.S.C section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5

The Fourteenth Amendment provides in pertinent part:
[N]or shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

A complaint alleged that Petitioner committed the willful, deliberate, and premeditated murder of Daniel Patrick Moreno on April 9, 2002, and that defendant personally and intentionally discharged a firearm proximately causing Moreno's death. (Pen. Code,§§ 187, 12022.53, subd. (d), 1192.7, subd. (c)(8).)
Defense counsel moved before trial to exclude defendant's statements to the police. The grounds were that although he had invoked his right to remain silent the officers persisted in questioning him, coercing him into making an incriminating statement despite the fact that he was intoxicated and therefore any statement was involuntary. The trial court held an evidentiary hearing at which it listened to tapes of defendant's interrogation and heard the testimony of police officers. There were two taped interviews of appellant. On both tapes he is laughing inappropriately, is heard to burp and sounds as if he is under the influence of something. In the first interview, he clearly and unequivocally invokes his right to

silence. The second interview ends when he clearly invokes his right to an attorney. However, in the second interview the officer, who is not identified on the tape, reads the rights so fast no one could understand them---although appellant can clearly be heard to say "Yeah I'll talk to you", there is no way he understood the second reading of his rights. (Tape 2. (Appendix D)
However, in the first interview the officers continue to talk to appellant after he invoked his rights---and they clearly and persistently cajoled, threatened, and brow beat him with the consequences of not talking to them. They tell him that he will have no further chance to tell his story unless he talks to them.
Officers ascertained that Petitioner thought he was detained at the border for not having identification and they told him they had to read him his rights because he was in the hole. One officer read the rights rapidly but intelligibly. *Petitioner denied knowing what the officers were talking about and then stated that he did not want to talk to them. The officer then told him that this is his opportunity to tell his side of the story and that if he does not want to tell them his side of the story then he will have to let the chips fall where they may.* The second officer then told him that he was charged with murder and that they knew he had been running for two and one half months. Under their

pressure, he admitted that the officers knew this. He denied running but the officers then asked him why he hasn't picked up his checks, telling him, he was going to care when you are in prison and would wish he had talked to them. They officers explained that they were talking about his life, and that if he did not talk to them "it's going to be over." They continued to shout at him and to impress him with their power over him." (Tape 1, Court's exhibit number 1.) It is not clear from the interviews how much time there was between the first and second interview. However in the second interview it is impossible to understand the *Miranda* warnings due to the excessive speed with which they are read. Under continued pressure, however, Petitioner agreed to talk to the officers. (Tape 2. Appendix D.) Following the hearing, the trial court denied the motion.

Following trial, the jury found defendant guilty of first-degree murder and found the firearm use enhancement allegation true. The trial court sentenced him to 25 years to life for the murder and to a consecutive term of 25 years to life for the firearm use enhancement. (Opinion, Appendix B, page 1) Timely notice of appeal was filed. Petitioner appealed the denial of his motion to exclude petitioner's statement, the trial court's refusal to appoint a coerced confession

expert at public expense, and the sentencing. Relying on this Court's decisions in *Miranda v. Arizona* 384 U.S.434 (1966), *Colorado v. Spring* 479 U.S. 564 (1987), and *Arizona v. Fulminante* 550 U.S. 938 (1991), he argued his confession was involuntary and the error was not harmless. Further, he claimed that he was intoxicated. The judgment was affirmed. The court found that Petitioner had not clearly invoked his right to silence and further that because he had recently pleaded guilty it concluded that he was aware of his rights.
This Petition follows the California Supreme Court's denial of discretionary review. (Appendix A).

REASONS FOR GRANTING THE WRIT

CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S REQUIREMENT THAT A SUSPECT IN CUSTODY MUST AFFIRMATIVELY AND CLEARLY INVOKE HIS RIGHT TO SILENCE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS

A. Introduction

In *Miranda v. Arizona* 384 U.S. 436 (*supra*) this Court made clear that the state may not question a suspect who is in custody without advising him of his due process rights, including the right to remain silent and the assistance of and consultation with counsel before and during any questioning. Further, this Court has inflexibly and consistently prohibited the use in the prosecution's case in chief of any statements obtained during any questioning in the absence of a clear, voluntary, intelligent, and knowing waiver of these rights:

"As for the procedural safeguards to be employed, unless other fully effective means

are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has aright to remain silent, that any

statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If however, he indicates in any manner and at any stage of the proceeding that he wishes to consult with an attorney before speaking there can be no questioning. *Likewise if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.* (*Miranda v. Arizona*, supra, 384 U.S. 436, 444-445.)

Therein lies California's problem. Petitioner contends that it is inconsistent with this Court's decisions interpreting *Miranda* to require a defendant to express his refusal to answer questions with the same degree of specificity that has been required to claim the right to counsel. That is in part because the exercise of the right to counsel requires that counsel be secured, whether appointed or retained. The exercise of the right to silence requires merely that the police stop asking questions. That the two

cases stand on different footings is clear even in Miranda. If the defendant has representation with him at the time of questioning, questioning need not stop just because he indicates his desire to remain

silent. (Id., n. 44.) That is, the presence of the attorney protects the defendant and absent evidence of overbearing may even be construed as a waiver of the right to remain silent. (Id.) Petitioner notes that the trial court equated the two, in fact, saying that since Petitioner knew and invoked his right to counsel, he knew his right to stop talking. (Opinion, Appendix B, at page 13.) California, further, ignores this Court's mandate, requiring that a defendant must "unambiguously invoke his right to remain silent". (Opinion, Appendix B at p.7) In so doing the Court of Appeal relies on a line of California state decision that purport to apply federal law but instead show that California is laboring under a misapprehension of the meaning of the words "*indicates in any manner that he does not wish to be interrogated*". Therefore, certiorari is appropriate for two reasons: first, to correct California's erroneous reading of this Court's precedent, and second, to clarify what a defendant must do in order to invoke his right to silence. If, as this Court has consistently held, that not only must the State demonstrate a voluntary, knowing and intelligent waiver; but also such may not be presumed from a silent record, how can California's requirement of an unambiguous invocation of the right to silence be correct? Certiorari is therefore necessary to resolve this

important question and to safeguard the due process rights of persons interrogated by the police.

B. California's *Miranda* jurisprudence directly contravenes this court's precedents and must be corrected to avoid further due process violations

The California courts below found that Petitioner had not "unambiguously invoked his right to silence. "
(Unpublished opinion, Appendix B, at page 7.)
The trial court found that he did not invoke his right to silence. "In evaluating a claim of whether a defendant invoked his or her right to remain silent under *Miranda* we accept the trial court's factual findings and evaluations of credibility if supported by substantial evidence.
While we must undertake an independent review of the record to determine whether the right to remain silent was invoked, we also "'give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.'
Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. We apply federal standards in reviewing appellant's claim that his statements were elicited in violation of *Miranda*." (*People v.*

Peracchi (2001) 86 Cal.App.4th 353, 359-360 (fns. omitted.)

"In order to . . . halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence or counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459, [129 L.Ed.2d 362, 114 S. Ct. 2350] (*Davis*), italics added.) It is not enough for a reasonable police officer to understand that the suspect might be invoking his rights. (Ibid.) Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda*, supra, 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether. (*Davis, supra*, 512 U.S. at pp. 459-462.)" (*People v. Stitely* 35 Cal.4th 514, 535(2005).)

Here, defendant's statement, "Cool dude," was ambiguous under *Davis v. United States*, supra, 512 U.S. 452; thus, the police were not required to stop asking questions at that point. Nevertheless, the officers did stop the interrogation shortly thereafter based on their belief that defendant was not going to provide any useful responses. (Opinion, Appendix B at page 14.)

This, Petitioner contends, is error. First, it ignores that the officers then proceeded to badger and cajole and attempt to coerce, ultimately successfully, the intoxicated, isolated, shackled, manacled petitioner into

talking by threatening him that he will never get his chance to tell his story and inferring that to fail to talk to them could cost him his life. This conduct, which the Court of Appeal dismisses, clearly violated the strictures on police conduct imposed by this Court in Miranda. Moreover, how did the police know defendant was not going to provide any useful responses? One inference is that they must have concluded that he had not waived his right to silence.

When the Court of Appeal affirmed Petitioner's conviction and necessarily ratified the trial court's denial of his motion to exclude his custodial statements, it relied on an erroneous reading of this Court's controlling precedent. It held, consistent with other California precedent that Petitioner had failed to clearly invoke his right to remain silent. The court based this on what it called the federal standard. (Opinion, Appendix B, at page 12.)

Petitioner contends that Certiorari is necessary because the Fourth Appellate District followed decisions from the Fifth Appellate District (*People v. Peracchi* 86 Cal. App. 4th 353 (2001) and the state Supreme Court (*People v. Stitely* 35 Cal. 4th 514(2005) which runs counter to the express language in Miranda "if he is alone and he indicates in any manner that he does not wish to be interrogated, the police may not question

him" (*Miranda v. Arizona*, 384 U.S. 436, 444.)

The State Supreme Court found that Stitely, who apparently refused to speak talking to the police after he said that he "might just stop talking" had not clearly invoked his rights as required by *Davis v. United States* 512 U.S. 452 (1994). (35 Cal.4th 514, 535). In so doing the Court relied on a line of State cases *People v. Gonzalez* 34 Cal.4th 1111, 1125 [23 Cal.Rptr.3d 295] (2005); *People v. Michaels* 28 Cal.4th 486, 510 [122 Cal.Rptr.2d 285] (2002); and *People v. Crittenden* 9 Cal.4th 83, 129-130 [36 Cal.Rptr.2d 474] (1994), for the principle that having been advised of and waived his rights a defendant must clearly invoke his rights in order require the police to stop the interrogation. However, *Davis* is not about the right to silence at all, it is about the assertion of the right to counsel during interrogation. As such it is totally inapplicable to Petitioner's case because when he indicated he wanted to talk to a lawyer the interrogation stopped.

Petitioner's case is about what happened between the time he was initially advised of his rights and received the lightening fast second advisement. Had this Court intended to discuss the right to silence in *Davis*, it would have done so.

Therefore, any reading of *Davis* to apply to the right to silence and to an unrepresented

suspect's right not to be badgered or cajoled or threatened into waiving his right to keep silent, is mistaken. As Petitioner has shown, the error is not isolated.
Certiorari is therefore necessary to correct California's misinterpretation of this Court's controlling precedent.
As California recognized, the Miranda rule protects a suspect's Fifth Amendment right to preclude the evidentiary use of statements made pursuant to a custodial interrogation unless the suspect has knowingly and intelligently waived the rights to remain silent and to the presence and assistance of an attorney, the latter provided at state expense for indigent suspects. (See *People v. Storm* 28 Cal.4th 1007, 1021 [124 Cal.Rptr.2d 110] (2002) " 'Interrogation' consists of express questioning, or words or actions on the part of the police that 'are reasonably likely to elicit an incriminating response from the suspect.'" (*People v. Cunningham, supra*, 25 Cal.4th at p. 993, quoting *Rhode Island v. Innis* 446 U.S. 291, 301(1980.)

C. Certiorari is required because there is a split among the circuits and within the state courts whether defendants must clearly invoke the right to silence
The confusion is not limited to California. The Eleventh Circuit has, similarly without serious analysis, expanded *Davis* (*United*

States v. Mickell 102 F.3d 470 (11 Cir. 1996).. So has the Eastern District of Michigan (*Mohn v. Bock* 208 F. Supp. 796 (E.D. Mich. 2002). On the other hand the Sixth Circuit has, Petitioner contends quite properly, held the State to its burden of proving a knowing, intelligent, and voluntary *waiver.* (*See Van Hook v. Anderson* 444 F.3d 830 (6th Cir. 2006). The Ninth Circuit has expressly rejected California's interpretation of *Davis*, (*Arnold v. Runnels* 421 F.3d 859 9th Cir. 2005). The Fifth Circuit has interpreted *Davis* to require the unambiguous assertion of a constitutional right, (*Hopper v. Dretke* 106 Fed. Appx. 221,(5th Cir. 2004), unpublished opinion), while the Tenth is more protective of the defendant's right to remain silent and to stop interrogation. (See, e.g. *United States v. Rambo* 365 F.3d 906 (10th Cir. 2004).)*Davis*, however, is silent on this point, nor has this Court held that a defendant must unambiguously assert his right to silence. Even *Davis* requires an unequivocal assertion of the right to *counsel* in order to stop an interrogation once begun.[1]

---

[1] Interestingly, the California Supreme Court has not consistently required the defendant to unambiguously invoke his right to silence. See, e.g. *People v. Peracchi* (2001) 86 Cal.App.4th 353, 359-360, cited in Unpublished Opinion at page 14. However,

The right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be unduly burdened. See *Miranda, supra*, at 468, n. 37. (*South Dakota v. Neville* 459 U.S. 553.565 (1983). Mr. Justice Kennedy's concurring opinion in *Texas v. Cobb* 532 U.S. 162,176 (2001), notwithstanding, this Court has never interpreted *Miranda* to require a defendant to clearly assert his right not to answer questions. Nor should it do so now.

D. Certiorari of petitioner's case is necessary because the California court improperly decided that petitioner's confession was voluntary

In Petitioner's case the court misapplied not only misconstrued *Miranda*, it also misapplied the totality of the circumstances test, finding that Petitioner's prior conviction could demonstrate his familiarity with the warnings. In the absence of any evidence that Petitioner was subjected to properly advised police interrogation in connection with those prior convictions, the guilty pleas have no tendency in reason to show that a defendant has any familiarity with his *Miranda* rights. Moreover, Petitioner was

---

the Court of Appeal clearly misapplied and misconstrued the test.

intoxicated and the court's findings were incorrect because Petitioner had been denied the services of a court appointed expert in coercion.

Petitioner contended that the officers' conduct after they recognized that he did not want to talk to them and before he broke down and confessed was constitutionally prohibited coercion. In order to bolster this claim, he requested appointment at public expense of an expert in coercion. The trial court refused because Petitioner had not made a proper showing of need. But Petitioner was then unable to provide the expert testimony and to fully provide the court with all the relevant circumstances, including the effect of his meth-amphetamine use, intoxication, isolation, and the officers' questions on his submission to their authority. Therefore, in assessing Petitioner's personal claim that his rights were violated, this Court is requested to consider that the trial court, by denying the motion for the expert, was not in possession of all the facts concerning the involuntariness of Petitioner's confession.

Both Petitioner and the Court of Appeal relied on *Colorado v. Connelly* 479 U.S. 157 (1986), but for different principles. That case's apparent discounting of the effect of Connelly's mental illness and other inherent factors in deciding that his confession was

voluntary confession calculus is distinguishable on its facts.

At the time he took Connelly's confession the officer, although he thought the confession was bizarre, inquired of the defendant whether he was ok, whether he was on drugs, whether he had been drinking, and discussed with him that he had been a patient in several mental hospitals in the *past.* They discussed why he was making the confession and the officer then re-advised him and did not take the confession until he was apparently satisfied that Connelly was all right. Connelly had initiated the conversation, had insisted on confessing and had reassured the officer that he was doing so because his conscience was bothering him. (Id at Page 160).

Petitioner cited *Connelly* for the proposition that in the absence of any indicia of coercion —this was initially an out of custody consensual encounter—-the officer was not even on duty, although he was in uniform— the issue of the defendant's mental state is not dispositive of the *Miranda/* due process issue. However, in Petitioner's case, the circumstances were inherently coercive and the officers had reason to inquire into Petitioner's mental state and utterly failed to do so. They contented themselves with saying at the hearing that he did not appear to be under the influence of methamphetamine and that he smelled

faintly of alcohol. Since there was no evidence, what criteria the officers used for this determination and since not all alcoholic beverages produce strong odors of alcohol, these facts do not show that petitioner was sober.

The government has the burden of proving that a defendant's statement is voluntary by a preponderance of the evidence at a pretrial suppression hearing. *United States v. Dodier*, 630 F.2d 232, 236 (4th Cir.1980) (citing *United States v. Johnson*, 495 F.2d 378, 382-83 (4th Cir.1974)). A statement is "involuntary" under the Fifth Amendment only if it is "involuntary" within the meaning of the Due Process Clause. *See Oregon v. Elstad*, 470 U.S. 298, 304, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985); *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir.1997). For a statement to be involuntary under the Due Process Clause, it must be "extracted by ... threats or violence", or "obtained by ... direct or implied promises" or "the exertion of ... improper influence." *Hutto v. Ross*, 429 U.S. 28, 30, 97 S. Ct. 202, 50 L.Ed.2d 194 (1976); *Braxton*, 112 F.3d at 780 (citing *Hutto*, 429 U.S. at 30, 97 S. Ct. 202); *accord Colorado v. Connelly*,479 U.S. 157, 165, 107 S. Ct. 515, 93 L.Ed.2d 473 (1986). "A confession is involuntary and subject to suppression when induced by such duress or coercion, express or implied, that the

accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *United States v. Wertz*, 625 F.2d 1128, 1133-34 (4th Cir.1980) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973)). Statements by an accused that are not " 'the product of a rational intellect and a free will' " are inadmissible as evidence. *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L.Ed.2d 290 (1978)).

CONCLUSION

Certiorari is required because California has improperly construed *Miranda* and cases following it to require a suspect to affirmatively and unambiguously assert his right to remain silent, thus turning on its head the prohibition that such person not be questioned unless he has voluntarily, knowingly, and intelligently waived his right to remain silent. For the foregoing reasons, therefore, this Court is requested to grant the writ.

Dated: 11/09/2006
Respectfully submitted

Barry O. Bernstein

Appendix to the Petition for Writ of Certiorari

APPENDIX TO PETITION

TABLE OF CONTENTS

UNPUBLISHED OPINION 28
OPINION OF THE COURT OF APPEAL 29
EVIDENCE TAPES 89

(Denial of discretionary review, retyped)

Court of Appeal Fourth Appellate District
Division 2- E037085
S144278

IN THE SUPREME COURT OF CALIFORNIA
En Banc

The People, Plaintiff and Respondent

v
Ralph Daniel Martinez, Jr., Defendant and Appellant

Petition for review denied.

(Stamped)
Supreme Court
Filed August 16,2006
Frederick K. Ohirick Clerk
Deputy

Appendix B
UNPUBLISHED OPINION[2]
Filed Court of Appeal 5/08/2006

[2] The judgment in the trial court was12/03/2004. The Court of Appeal rendered its opinion on 5/8/2006

OPINION OF THE COURT OF APPEAL
Filed 5/8/06 P. v. Martinez CA4/2
(Trial court judgment 12/03/2004)
NOT TO BE PUBLISHED IN OFFICIAL REPORTS[3]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RALPH DANIEL MARTINEZ, JR., Defendant and Appellant.	E037085 (Super.Ct.No. RIF102923) OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed.

---

[3] California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Law Offices of Barry Bernstein and Barry Bernstein for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Deana L. Bohenek, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Ralph Daniel Martinez, Jr., appeals from his conviction of first degree murder and the true finding on the enhancement allegation that he personally used a firearm in the commission of the crime. He contends that (1) his pretrial statement should have been excluded as involuntary because it was the product of coercion after he invoked his right to silence; (2) the trial court denied him his right to make a defense when it denied his ex parte motion to hire a forensic interrogation/coercion expert; (3) the sentence of 25 years to life for the firearm use enhancement should be vacated as unauthorized by statute; (4) the evidence was insufficient to show that he committed murder deliberately and with premeditation; and (5) the 25-year-to-life sentence for the firearm use violates the Eighth Amendment prohibition against cruel and unusual punishment. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. Procedural History

A complaint alleged that defendant committed the willful, deliberate, and premeditated murder of Daniel Patrick Moreno on April 9, 2002, and that defendant personally and intentionally discharged a firearm proximately causing Moreno's death. (Pen. Code,[4] §§ 187, 12022.53, subd. (d), 1192.7, subd. (c)(8).)

Defense counsel moved before trial to exclude defendant's statements to the police. The trial court held an evidentiary hearing at which it listened to tapes of defendant's interrogation and heard the testimony of police officers.

Following the hearing, the trial court denied the motion.

Following trial, the jury found defendant guilty of first degree murder and found the firearm use enhancement allegation true. The trial court sentenced him to 25 years to life for the murder and to a consecutive term of 25 years to life for the firearm use enhancement.

B. Evidence at Trial

The prosecution's theory at trial was that defendant had shot Daniel Moreno in the mistaken belief that he was a man named Richard Garcia with whom defendant had previously fought.

Melissa Morreo testified that defendant was her cousin on her mother's side, and Moreno had been her cousin on her father's side. In

---

[4] All further statutory references are to the Penal Code unless otherwise indicated.

April 2002, Moreno had been living in her home. Morreo also knew Garcia. In April 2002, both Moreno and Garcia had short hair.
In the evening of April 9, Moreno had been walking down a road on the Soboba Indian Reservation wearing denim pants, white shoes, and a gray hooded sweatshirt with the hood on his head. The sweatshirt belonged to Garcia, who had previously lent it to Morreo. Morreo heard gunshots nearby and looked out the window. She saw a white van with a man nearby; she thought the man was defendant because
of his red hat and baggy shorts. The man was picking something up off the ground that Morreo thought might be shotgun casings. The van drove away toward the east with its lights off. Morreo recognized the van as belonging to the Briones family, who lived five or six houses up the street to the east. Morreo went to the spot where the van had stopped, and she found Moreno lying on the ground. Police officers found plastic wadding from three shotgun shells at the scene. About a month before the shooting, Morreo had heard Aurelia Najar tell Garcia that she would have defendant, Najar's cousin, shoot Garcia.

Lydia Ramirez testified that in April 2002, she had been living with her friend Aurelia Najar. Several weeks before the shooting, defendant had a fight there with Richard Garcia. After the fight, defendant told Garcia "he better not catch him up there or he was going to shoot him." Sometime

between 8:00 and 9:00 on the night of the shooting, defendant showed up at Najar's house. He lay on the floor watching television. The next morning, defendant was still there. The police showed up next door, and defendant jumped out the window. Sheriff's deputies had conducted a taped interview of Ramirez on May 9, 2002. A tape of the interview was played for the jury and a transcript was provided to the jury.

Najar testified that defendant was her cousin. Najar testified that defendant had fought with Garcia at her house about a month before the shooting, but she had not heard defendant make any threat to Garcia after the fight. On the night of the shooting, defendant came to her house. Defendant sat with her and Ramirez and watched television. He was not acting unusual, and he did not appear to be drunk or intoxicated. Defendant spent the night at her house. The next morning he jumped out the window. Najar told a police investigator that on April 10, she had told defendant he had shot the wrong guy, and defendant had responded, "No shit," and "Fucked up." At trial, however, Najar stated she did not remember making those statements to the investigator. She also did not remember telling Ramirez that defendant had been the shooter. Garcia had been Najar's boyfriend for awhile, and he had beaten her and cheated on her. Najar denied that she had threatened Garcia that she would have defendant or another cousin shoot him or beat him up. Najar

denied that she had ever heard defendant say he had shot either Garcia or Moreno or that she had ever heard defendant threaten them.

Sheriff's investigator Robert Masson testified that he served a search warrant at defendant's house on April 10, 2002. Three 12-gauge shotgun shells were found near the couch and other ammunition was found in the house. A red cap was found on the couch. A shotgun was found in the dining room.

Riverside Sheriff's Department homicide investigator Robert Masson testified that early in the morning of July 27, 2002, he and Detective Bruce Moore were notified that defendant was being detained at the border patrol station in San Ysidro. Masson and Moore contacted defendant at the border patrol station at about 4:30 a.m. that day. Defendant was relaxed, quiet, and joking around. He smelled faintly of alcohol, but he did not appear to be under the influence of methamphetamine.

During the initial interview, which lasted only about eight minutes, defendant told Masson and Moore that he did not have an identification card. Masson told defendant they had to read him his rights because he was locked up. Defendant said that was okay. Moore read defendant his Miranda rights and then asked defendant, "With these right[s] in mind do you wish to talk to me about that night?" Defendant asked, "What?" Moore repeated the question, and defendant laughed and said,

"Um." Moore then said, "No?" and defendant responded, "I don't even know what you're talking about[,] dude." Moore said that he wanted to hear defendant's side of the story. He stated, "If you don't want to tell me your side of the story, like I said you'll have to let the chips fall where they may. Okay? That cool?" Defendant replied, "Cool dude."

The officers told defendant he was being charged with murder, and they knew he had been running from the police. Defendant then said, "No." Masson told defendant that the police had reported that defendant had recently been in a pursuit. Defendant said, "Shit," and then said, "I didn't even know that."

After a few minutes of further conversation, it became apparent that defendant was not going to cooperate in the interview, and the officers terminated the interview and began preparing to transport defendant back to Riverside. Masson testified that after the first interview, defendant was placed alone in a secured office for a few minutes. Masson and defendant then walked toward the car. Defendant was wearing shackles and large pants, which kept slipping down. Masson joked with defendant and told him he would not pull up defendant's pants for him.

While they were walking, Masson told defendant that he should tell the truth about what had happened because many people had already told the officers what had happened. Masson believed he had established rapport with defendant, who was

joking around about his pants. Defendant told Masson that he would talk. Masson put defendant in the front seat of the car and then called Moore over. Masson re-read the Miranda advisements and the officers taped the interview in the car. Defendant was wearing waist chains and shackles during interview. Masson sat in the back seat during the interview; Moore was also present. Moore was then informed that defendant wanted to talk further, and the detectives conducted a second interview. Tape recordings of both interviews were played for the jury and the jury was provided with transcripts of the interviews.

During the first interview, which lasted only about eight minutes, defendant did not make any incriminating statement. The second interview took place in the officer's car about 15 minutes after the initial Miranda advisements were read to defendant. Masson re-read the advisements, albeit rapidly. Defendant said he understood those rights.

Masson and Moore asked defendant where he was on the night of the shooting. Defendant said he had been at Najar's house after 7:30 p.m. with Najar, another woman, and a baby. He spent the night there, and the next morning, he left out the window when the police showed up. He then went to his sister's home on the Morongo reservation.

Moore said, "I have your uncle telling me that you came home, okay? [¶] . . . [¶] Telling him that you shot the wrong person."

Defendant replied, "Oh [f]uck. . . ." Moore said, "And I know it was the wrong person. Okay?" Defendant said, "Yeah."
Moore told defendant he knew about the fight with Garcia. Defendant stated, "[H]e's a punk anyways." Defendant further described Garcia's bad character, and Moore said defendant was not telling him anything he did not know. At that, defendant laughed.
Moore said, "I know that it was intended for . . . E.T. as you guys called [Garcia]." Defendant said, "Yeah." Moore said, "Right?" and defendant said, "Fuck yeah, I guess."
More discussion ensued about Garcia and his fight with defendant. Moore and Masson again asked defendant if he thought it had been Garcia that night. Defendant laughed and said, "It looked like Richard. Fuck." Moore asked, "So did you just see him walking down the road?" Defendant replied, "Yeah. I drove by him like three or four times."
Defendant said he did not remember what he had been doing with the gun or how many times he had shot Moreno because he had been using speed that night and he was "so fucked up . . . ." When he saw the man he believed to be Garcia on the side of the road, defendant was angry that Garcia did not respect him enough to heed his warning not to return to the reservation. Defendant wanted to "[s]how him what the fuck I said." Moore said that defendant was going to back up what he had told Garcia before, and defendant replied, "I ain't no punk, dude. I

gotta' do, what I gotta' do. That's what I'm gonna' do."
Defendant said he would not have done this if he had not been using speed. When Moore asked if he had been upset when he found out he had shot the wrong man, he said, "Yeah kind of. Actually kind of hurts dude." Defendant said he did not know the victim and the fact he had shot the wrong man was "some kind of Hollywood movie shit." Defendant said he thought he would probably receive about 10 years in prison. The officers said they did not know, and defendant asked, "More than that?"

Defendant said he had shot Moreno from close range. Moreno began to turn toward him just as defendant shot, and defendant realized he had just shot the wrong person.

When the officers asked him where the shotgun was, defendant then said he wanted to talk to his lawyer. Masson and Moore terminated the interview.

Moore testified that he had interviewed Najar on April 10 and May 8, 2002. In the first interview, she stated she would not tell where defendant was, even if she knew, because she did not want him to think she was a snitch. In the second interview, she told him she had broken up a fight between defendant and Garcia. She had threatened Garcia that she would get another cousin to "kick [his] ass." On the night of the shooting, defendant came to her house at about 9:30 or 10:00, and he ran and leapt

out the window the next morning when the police arrived next door.

Dr. Joseph Cohen, a forensic pathologist, testified that he had conducted an autopsy on Moreno's body. He testified that Moreno had five entrance wounds showing he had been shot from the back. Five shotgun pellets were removed from Moreno's body. Moreno had died from bleeding in the chest cavity resulting from shotgun wounds to the aorta and lung; he had also sustained injuries to five ribs and to his liver and kidney. Cohen testified that Moreno had been shot from a distance of about five to 10 feet.

Tracy Ramirez testified that she lived with defendant's uncle, Julian Briones. She had lent her white van to defendant on April 9, 2002, at about 4:00 in the afternoon. She went to bed at about 8:30 p.m., and some time after that she heard a car pull in fast and she heard someone pounding at the back door. She got up and saw defendant on the back porch. She heard defendant say to his uncle, "I got him." She had earlier told a police investigator that she had heard defendant say, "I got him," or "I got E.T." E.T. was Garcia's nickname.

III. DISCUSSION

A. Admissibility of Defendant's Pretrial Statements

Defendant contends the judgment must be reversed because his pretrial statements were involuntary because they were the product of coercion after he invoked his right to silence, and he had been intoxicated when

he made the statements. He also argues that the trial court erred in relying on advisements he had received in prior criminal proceedings.

1. Standard of Review

On review, "[a]n appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under Miranda insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is predominantly legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. [Citation.]" (People v. Waidla (2000) 22 Cal.4th 690, 730.)

2. Evidence at Motion to Exclude

Riverside Sheriff's Department homicide investigator Robert Masson testified that early in the morning of July 27, 2002, he and Detective Bruce Moore were notified that defendant was being detained at the border patrol station in San Ysidro. Masson and Moore contacted defendant at the border patrol station at about 4:30 a.m. that day. Defendant was relaxed, quiet, and

joking around. He smelled faintly of alcohol, but he did not appear to be under the influence of methamphetamine.

During the initial interview, which lasted only about eight minutes, defendant told Masson and Moore that he did not have an identification card. Masson told defendant they had to read him his rights because he was locked up. Defendant said that was okay. Moore read defendant his Miranda rights and then asked defendant, "With these right[s] in mind do you wish to talk to me about that night?" Defendant asked, "What?" Moore repeated the question, and defendant laughed and said, "Um." Moore then said, "No?" and defendant responded, "I don't even know what you're talking about[,] dude." Moore said that he wanted to hear defendant's side of the story. He stated, "If you don't want to tell me your side of the story, like I said you'll have to let the chips fall where they may. Okay? That cool?" Defendant replied, "Cool dude."

The officers told defendant he was being charged with murder, and they knew he had been running from the police. Defendant then said, "No." Masson told defendant that the police had reported that defendant had recently been in a pursuit. Defendant said, "Shit," and then said, "I didn't even know that."

After a few minutes of further conversation, it became apparent that defendant was not going to cooperate in the interview, and the officers terminated the

interview and began preparing to transport defendant back to Riverside. Masson testified that after the first interview, defendant was placed alone in a secured office for a few minutes. Masson and defendant then walked toward the car. Defendant was wearing shackles and large pants, which kept slipping down. Masson joked with defendant and told him he would not pull up defendant's pants for him. While they were walking, Masson told defendant that he should tell the truth about what had happened because many people had already told the officers what had happened. Masson believed he had established rapport with defendant, who was joking around about his pants. Defendant told Masson that he would talk. Masson put defendant in the front seat of the car and then called Moore over. Masson re-read the Miranda advisements and the officers taped the interview in the car. Defendant was wearing waist chains and shackles during interview. Masson sat in the back seat during the interview; Moore was also present. The substance of the interviews is set forth above in the Statement of Facts.

The trial court found that both of defendant's statements were voluntary. The court noted that defendant had been advised of his legal rights in connection with at least two prior cases. The court then stated, "the initial advisement of rights by Detective Moore was a complete advisement and those— that advisement was probably 10 or 15 minutes prior to the Masson interview.

While the Masson interview was not a very good advisement, I think it still got the point across and advised the defendant that there were certain legal and constitutional rights, which I have no doubt which the defendant knew." The court pointed out that defendant had invoked his right to a lawyer at the end of the second interview, and thus he understood his right to stop talking. The court stated, "[Defendant] is clearly not intimidated by this process. I mean, he laughs and he gets along pretty well. He refers to the officers as dude. . . . [W]hile this is one of the fastest Miranda invocations I ever had, this is probably one of the most comfortable defendants I've ever had who was being interview involving a homicide investigation."

The court also found that defendant had not invoked his right to remain silent by saying "[t]hat's cool" in the first interview. The court concluded, "I really don't have much doubt here that he was in full control and that he knew what his rights were. And when he finally decided to talk to him, he did talk to him, and I don't find that the police were engaged in any improper conduct." The court therefore found the statements admissible.

3. Discussion

a. Defendant never unambiguously invoked his right to remain silent.

Defendant argues that he invoked his right to silence during the initial interview by Moore and Masson. The trial court found that he did not invoke his right to silence. "In evaluating a claim of whether a defendant invoked his or her right to remain silent under Miranda we accept the trial court's factual findings and evaluations of credibility if supported by substantial evidence. While we must undertake an independent review of the record to determine whether the right to remain silent was invoked, we also "'give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. We apply federal standards in reviewing appellant's claim that his statements were elicited in violation of Miranda." (People v. Peracchi (2001) 86 Cal.App.4th 353, 359-360 (fns. omitted.) "In order to . . . halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence or counsel. (Davis v. United States (1994) 512 U.S. 452, 459, [129 L.Ed.2d 362, 114 S.Ct. 2350] (Davis), italics added.) It is not enough for a reasonable police officer to understand that the suspect might be invoking his rights. (Ibid.) Faced with an ambiguous or equivocal statement, law enforcement officers are not required under Miranda, supra, 384 U.S. 436, either to ask

clarifying questions or to cease questioning altogether. (Davis, supra, 512 U.S. at pp. 459-462.)" (People v. Stitely (2005) 35 Cal.4th 514, 535.)

Here, defendant's statement, "Cool dude," was ambiguous under Davis, v. United States, supra, 512 U.S. 452; thus, the police were not required to stop asking questions at that point. Nevertheless, the officers did stop the interrogation shortly thereafter based on their belief that defendant was not going to provide any useful responses.

Once defendant was moved to the police car and indicated his desire to speak, Masson re-read the Miranda advisements, albeit rapidly. Defendant expressly affirmed that he understood his rights. Then, instead of exercising the right to remain silent, defendant continued talking about the crime. Under the circumstances, we conclude the trial court did not err in finding that defendant did not invoke his right to remain silent, and nothing prevented the officers from continuing the interview.

b. The second Miranda advisement was not required.

Defendant argues that the advisement of his Miranda rights was incomplete, apparently based on Masson's rapid-fire reading of the advisements in the officers' car. However, one Miranda warning is sufficient to allow an intelligent waiver at a subsequent interrogation that is "reasonably contemporaneous." (People v. Johnson (1973) 32 Cal.App.3d 988, 997.) It is a

question of fact whether the subsequent interrogation is reasonably contemporaneous. (People v. Bynum (1971) 4 Cal.3d 589, 600 [30 to 40 minutes was reasonably contemporaneous], overruled on another ground in People v. Williams (1976) 16 Cal.3d 663, 669; People v. Meneley (1972) 29 Cal.App.3d 41, 58 [15 minutes was reasonably contemporaneous, and no re-admonishment was required], overruled on another ground in People v. Bolton (1979) 23 Cal.3d 208, 213-214.)

"'The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the *prior advisement*, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights. [Citations.]' (People v. Mickle (1991) 54 Cal.3d 140, 170 . . . [readvisement unnecessary where defendant twice received and twice waived *Miranda* rights 36 hours before].)" (People v. Lewis (2001) 26 Cal.4th 334, 386.)

Here, the court found that the second interview took place only 10 or 15 minutes after the initial Miranda advisement.

Thus, even if the second advisement was so rapid as to be partly unintelligible, that second advisement was not required.

c. The trial court did not erroneously rely on defendant's Miranda advisements in prior arrests.

Defendant argues that in finding his pretrial statements admissible, the trial court erroneously relied on his prior arrests in finding that he knew his rights.

In announcing its ruling on the motion to suppress the statements, the trial court noted that defendant had previously been advised of his rights in previous cases, including at an arraignment only four or five months before the challenged interview. The court then stated, "And I would note that the initial advisement of rights by Detective Moore was a complete advisement and those – that advisement was probably 10 to 15 minutes prior to the Masson interview. While the Masson interview was not a very good advisement, I think it still got the point across and advised the defendant that there were certain legal and constitutional rights, which I have no doubt which the defendant knew."

As noted above, the defendant's sophistication or past experience with law enforcement was relevant to whether defendant understood and waived his rights. (People v. Lewis, supra, 26 Cal.4th at p. 386.) Moreover, the trial court did not rely solely on the fact that defendant had received Miranda advisements in his previous criminal proceedings, but based its finding on the contemporaneous warnings given by Moore and Masson. The trial court did not err in this regard.

d. Defendant's statement was not the product of coercion.

Defendant next argues that his statement was the product of coercion. He contends his statement was involuntary because it was the product of psychological pressures and intoxication. Defendant argues that the officers put "relentless pressure" on him by statements and "persisted in threatening him with death." We have listened to the tape of the interview and have read the transcript,[5] and we conclude that defendant's arguments

---

[5] The transcript of the first interview indicates that Moore read defendant his rights and asked defendant if he wished to talk. Defendant said several times he did not know what Moore was talking about and that he did not know if he wanted to talk. Moore then said, "All right. Well like I said that's why . . . we go through this, okay. And that's why I said you have your opportunity to tell me your side of the story." Defendant replied, "Yeah." Moore said, "That's why I want to hear your side of the story. Okay? If you don't want to tell me your side of the story, like I said you'll have to let the chips fall where they may. Okay? That cool?" Defendant replied, "Cool dude." Moore then told defendant that he was "in a shitload of trouble" and that he was "charged with murder." Moore continued, "That's . . . why we're down here. Okay? We're getting all kinds of story's [*sic*] that put you on the crime. Okay, we have witnesses. We have

physical evidence. Okay, you obviously know we went to your house." Defendant replied, "Yes." Moore stated that defendant had not come to them on his own, and he had been running. Moore stated that he had "talked to everybody" and he knew that defendant had run out the window at Najar's house. Defendant's responses to these statements included denials, statements of disbelief, burping, and laughter.

The officers discussed that Martinez had failed to collect his checks. The following exchange ensued:

"MASSON: . . . Obviously do, do you think we're just frickin' stupid guys here? Okay?

"[DEFENDANT]: Shit. I don't care dude.

"MASSON: Okay, well you're gonna' care when you're in prison.

"MARTINEZ: Shit.

"MASSON: Okay. That's what you're gonna' care about.

"MOORE: At, at that point then you're gonna' sit there and go, gee whiz, whiz I wish I would've had my opportunity to talk to those detectives. Okay?

"MARTINEZ: Oh yeah?

"MASSON: Yeah.

"MOORE: And that's when it's gonna' be too late. All right. That's the bottom line.

"MARTINEZ: (Chuckles)

"MOORE: That's when it's gonna' be too late. Okay and we're heading down that road right now. Okay? This is the last chance road. Once we cross this road then it's done. Okay?

are meritless. The tape and transcript of the eight-minute interview reveal neither death threats nor "relentless pressure."
"A confession is involuntary if an individual's will was overborne. [Citations.]" (In re Shawn D. (1993) 20 Cal.App.4th 200, 208.) Threats or implied promises of leniency may render a statement involuntary. (People v. Neal (2003) 31 Cal.4th 63, 79.) Police are

---

"MASSON: We just want you to know. That you know, this is not like a game here, okay?
"MARTINEZ: Yeah I know that.
"MASSON: So.
"MOORE: You, we're talking about your life. All right?
"MARTINEZ: Oh, I know man.
"MOORE: Your life. Not ours. Okay? We're gonna' go home tonight and we're gonna' go to bed and we're gonna' sleep and we're gonna' live normal life again. Okay you, and as you stand here and play stupid with me and insult me, okay? Which is insulting to me, all right. Stand here and tell me oh, I been running, really? I didn't know that?
"MARTINEZ: (Yawns)"
Moore told defendant that he had arranged to have defendant's checks held so defendant would not have any money. Moore concluded the first interview by stating, "That's fine, so if you don't want to talk to us will just [*sic*]. We'll have to take you back to Riverside and we'll, we'll go from there, okay? Go ahead you're done. And we'll be done."

prohibited from using only those psychological ploys that, under all the circumstances, "'are so coercive that they tend to produce a statement that is both involuntary and unreliable.'" (People v. Jones (1998) 17 Cal.4th 279, 297-298, quoting People v. Ray (1996) 13 Cal.4th 313, 340.) When the police merely point out a benefit that flows naturally from truthful conduct, a subsequent statement will not be considered involuntary. (People v. Thompson (1990) 50 Cal.3d 134, 170.) Thus, a police officer does not invalidate a subsequent confession by merely commenting on the realities of the situation. (People v. Seaton (1983) 146 Cal.App.3d 67, 74.) Similarly, police comments to the effect that the accused would "feel better" or would "help[] himself by cooperating" do not alone establish improper inducement. (People v. Jackson (1980) 28 Cal.3d 264, 299-300, disapproved on another ground in People v. Cromer (2001) 24 Cal.4th 889, 901, fn. 3.) "[T]ruthful and 'commonplace' statements of possible legal consequences, if unaccompanied by threat or promise, are permissible police practices. . . ." (People v. Flores (1983) 144 Cal.App.3d 459, 469.) A defendant's custodial statement is voluntary if there was no coercion, and the defendant knew he could stop talking and that what he said could be used against him. (People v. Clark (1993) 5 Cal.4th 950, 987.) ""Under both state and federal law, courts apply a 'totality of circumstances' test

to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.]"' [Citations.]" (People v. Ramos (2004) 121 Cal.App.4th 1194, 1202.)

Here, defendant bases his argument that his statements were coerced on the officers' conduct during the first interview. That interview lasted only eight minutes. This is in stark contrast to cases in which courts have found coercion based on the length of interrogation. (See Ashcraft v. Tennessee (1944) 322 U.S. 143, 153 [36 hours of continuous interrogation by officers acting in shifts was coercive]; cf. People v. Hill (1992) 3 Cal.4th 959, 981-982 [finding interrogation not unfairly coercive based on length when the defendant was interrogated in five sessions over a 12-hour period when the defendant never requested a break in the interview or asked that it be terminated] (overruled in part on another ground in Price v. Superior Court (2001) 25 Cal.4th 1046,

1069, fn. 13).) The interview took place while defendant was in custody at the border patrol office; only two officers participated. Defendant was then approximately 23 years old; the record does not indicate his educational level. Although defendant contends on appeal that he was intoxicated, he did not present sufficient evidence at the motion to suppress to support that contention, as discussed below. We conclude that the record fails to show coercion, and the trial court did not err in admitting defendants' statements.

e. Defendant failed to establish that his statement was involuntary because of his intoxication.

Defendant also contends his statement was involuntary because he was intoxicated. Under People v. Mayfield (1993) 5 Cal.4th 142, a defendant has the burden of showing any alleged deficiency that rendered him incapable of free or rational choice.

Moore testified that defendant had vomited before the interview and he smelled faintly of alcohol. In addition, defendant notes that he laughed inappropriately during the interviews and was heard to burp.

We conclude this evidence was insufficient to meet defendant's burden of showing intoxication. Defendant made no showing of how much alcohol he had consumed or when he had consumed it. Moreover, his responses to the officers' questions -- and his ultimate invocation of his right to counsel -- indicate that he understood his rights and chose to waive

them. (See *People v. Prysock* (1982) *127 Cal.App.3d 972, 988-992.)*

f. Defendant failed to establish that his statement was the product of an illegal arrest or unlawful search.

Defendant contends his confession was inadmissible because it was the product of an unconstitutional search and seizure and illegal arrest. Although defendant cites general principles of law concerning the inadmissibility of evidence obtained as a result of an illegal arrest or unlawful search, he has failed to provide any citation to evidence in the record that would support his contention that his arrest was illegal or that any unlawful search was conducted. Moreover, in his motion to suppress his confession in the trial court, defendant made only the same conclusionary arguments without any specific reference to the facts of the case. We therefore consider the issue waived.

B. Denial of Application to Hire a Forensic Interrogation/Coercion Expert

In June 2004, before trial, defense counsel filed an ex parte application requesting the appointment of a confidential expert under Evidence Code sections 730 and 952. The application requested that the court appoint expert Thomas Streed to assist the defense at county expense; Streed's fee was estimated to be $7500. In a declaration filed in support of the application, defense counsel stated that although he was retained

by defendant's family, he was informed and believed that defendant was indigent and the family's financial resources were exhausted. Defense counsel argued that the inquiry into improper procedures and coercive techniques by police was needed in defendant's case. The trial court denied the application without stating reasons for doing so. The court's minute order dated June 14, 2004, stated, "The Court has read and considered the Ex-Parte Correspondence submitted by [defense counsel] re: Appoint Thomas Streed @ County Expense."
On a showing of necessity, the trial court must provide an indigent defendant expert defense services. (People v. Worthy (1980) 109 Cal.App.3d 514, 521.) The defendant has the burden of showing indigency and the reasonable necessity for such services. (Id.; Puett v. Superior Court (1979) 96 Cal.App.3d 936, 939.) A trial court's order denying such services is reviewed for abuse of discretion. (Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 321.) Here, the trial court could reasonably have concluded that defendant failed to show either indigency or necessity.

1. Failure to Show Indigency

In March v. Municipal Court (1972) 7 Cal.3d 422, 429, the court stated, "Although there are no cases specifically establishing criteria by which the trial court is to determine indigency for purposes of providing transcripts at public expense, the same criteria governing applications to proceed in forma pauperis for purposes of eliminating filing fees are applicable." Government Code

section 68511.3 sets forth the procedures for establishing indigency for purposes of proceeding in forma pauperis. A party seeking such status must file a declaration under penalty of perjury that he or she is receiving welfare benefits or must file a financial statement under oath on a prescribed Judicial Counsel form. (Gov. Code, § 68511.3.) Here, defendant provided no declaration or affidavit of indigence or financial statement; rather, retained counsel merely stated based on information and belief that defendant was indigent. The trial court could reasonably have concluded that this showing was insufficient to establish defendant's indigency.[6]

2. Failure to Show Necessity

The record is clear that the trial court was aware of its discretion to appoint an expert if required – defendant had retained psychological experts to evaluate his mental condition, and he had entered a plea of not guilty by reason of insanity, following which the court appointed two doctors to examine him and to provide written reports to the court.

---

[6] We note, although the information was not before the trial court at the time it ruled on the application, that defendant's probation report shows that he receives an income of $5,000 per month from "Indian Gaming proceeds." Moreover, defendant continues to be represented by retained counsel on appeal.

On June 4, 2003, defense counsel requested that defendant be transported to the Amen Clinic in Newport Beach for testing and brain imaging. The court denied the motion, finding that defendant had failed to show good cause. In addition, the court noted that it had not been shown who would cover the costs. The court indicated it would grant the motion if defendant would absorb all the costs.

On August 13, 2003, the court denied defendant's motion requesting he be removed to the Amen facility. The minutes indicate that the court asked if defendant was indigent. On August 15, however, the court granted the motion without stating any reasons for doing so. The next month, the court granted a jail access order to allow a defense clinical psychologist and neuropsychologist to examine defendant at the jail. Based on this record, the court could reasonably have believed that another defense expert was not reasonably necessary for the purpose of, among other things, meeting with and evaluating defendant. Counsel's declaration stated that it was "suggested" that "inappropriate police conduct was utilized to elicit certain responses and statements from the defendant during . . . interrogation," and that "an inquiry is needed regarding certain analysis to be evaluated regarding potential police force and improper procedure, and coercive techniques used as against the defendant." Defense counsel stated,

"Specifically, I am in need of an expert to review the discovery, the scene, police procedure manuals, statements, transcripts, and to meet with, and evaluate [defendant] for the purpose of establishing a proper defense and to produce a report to the court for evaluations."

This declaration shows that counsel's request was merely a fishing expedition. Thus, defendant did not establish the necessity for an appointed expert for the requested purpose. (See People v. Worthy, supra, 109 Cal.App.3d at p. 522 & cases cited). The denial of the request was not an abuse of discretion.

3. No Prejudice Was Shown

Finally, even if the trial court abused its discretion in summarily denying the request for appointment of an expert, we perceive no prejudice to defendant from the denial. (See People v. Worthy, supra, 109 Cal.App.3d at p. 523.) Defendant argues that the assistance of the expert would have supported his claim that his confession was involuntary. Specifically, he contends that he was "interrogated by two officers who persisted in threatening him with death – 'it's your life'-- if he did not talk to them and that he would not get another chance to tell his story. They told him they were the only ones who could help him." As discussed above, defendant's factual contentions are not supported by the record. We have listened to the tape recording of the interview and have read the transcript, and we

conclude that no reasonable person could conclude that the officers ever threatened defendant with death or that their remarks suggested to defendant that they were the only ones who could help him. Their remarks indicating that defendant might later wish he had told his story to them fall within the general category of permissible remarks commenting on the realities of the situation. (See People v. Seaton, supra, 146 Cal.App.3d at p. 74 ["'It is settled that admonitions to tell the truth do not amount to coercion'; nor do 'assertions that one is better off telling the truth' constitute false promises of leniency"].) Moreover, the entire first interview during which the allegedly coercive statements and conduct occurred lasted only eight minutes. Thus, the record does not support defendant's argument that his confession was involuntary, and we perceive no reasonable possibility that expert testimony would have altered that fact.

In addition, ample evidence aside from his confession supported defendant's guilt. Defendant stated to Briones that he "got" the person he thought was Garcia. Morreo saw a person she believed to be defendant picking up something from the road near the victim's body, and she saw the person drive away from the scene in a white van with the headlights off. Morreo identified defendant as the person she had seen based on the clothing he was wearing. Similar items of clothing were found in a search of defendant's home. Defendant had borrowed

a white van from Briones's girlfriend earlier that day, and he returned the van by driving up their driveway at a high rate of speed with the headlights off after the shooting. Other witnesses testified that defendant had previously threatened to shoot Garcia if Garcia ever returned to the reservation. Garcia and the victim were similar in size and appearance, and the victim was wearing Garcia's sweatshirt. When defendant saw the police the morning after the shooting, he jumped out a window and was "on the run" for several months. Thus, any error in failing to appoint an expert on the subject of coercive police interrogations was harmless.

C. Sentence for Firearm Use

Defendant challenges his 25-year-to-life sentence enhancement for firearm use under section 12022.53, subdivisions (j), on the ground the sentence was unlawful because the enhancement may not be imposed when another provision of law provides for a greater penalty or longer term of imprisonment, and section 190 provides for a greater penalty. The Supreme Court has granted review in People v. Shabazz (S131048, rev. granted Mar. 16, 2005) to address the same issue.

Section 12022.53, subdivision (j) states:

"When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than

imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment." (Italics added.)
In People v. Chiu (2003) 113 Cal.App.4th 1260, the court concluded that the italicized portion of subdivision (j) refers to a penalty for the use or discharge of a firearm during the commission of certain enumerated felonies, and not to the punishment for the underlying offense. Thus, the court concluded that the subject of the last sentence of subdivision (j) is the "'enhancement specified in this section,'" i.e., one of the three applicable enhancements for firearm use or discharge specified in subdivisions (b) through (d) of section 12022.53. The court stated: "When one of those three enhancements for firearm use or discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment for that firearm use or discharge, in line with that subject. The 'greater penalty' part of subdivision (j) ensures that the '[n]otwithstanding any other provision of law' language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even greater punishment on a defendant for employing a firearm in committing one of the enumerated crimes." (People v. Chiu, supra, 113 Cal.App.4th at p.

1264.) We agree with the analysis and conclusion of the court in People v. Chiu. Here, no greater punishment for the firearm use was available than the enhancement imposed under section 12022.53, subd. (j). There was thus no error in imposing the enhancement.

D. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his conviction of first degree murder.

1. Standard of Review

In reviewing a defendant's claim that the evidence was insufficient to support a conviction, this court must review the evidence in the light most favorable to the People to determine whether the record discloses substantial evidence from which a rational jury could have found the elements of the crime beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 575-578, citing Jackson v. Virginia (1979) 443 U.S. 307.) We will presume in support of the judgment the existence of every fact the trier of fact could reasonably infer from the evidence. (People v. Barnes (1986) 42 Cal.3d 284, 303.) We do not reweigh the evidence or assess the credibility of the witnesses. (People v. Alcala (1984) 36 Cal.3d 604, 623, superseded by statute on other grounds as stated in People v. Falsetta (1999) 21 Cal.4th 903, 911.)

2. The Evidence Was Sufficient to Support the Conviction

""[P]remeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" [Citation.]" (People v. Vorise (1999) 72 Cal.App.4th 312, 318.) The law does not require that a defendant plan an action for any great time in advance. Categories of evidence that are typically sufficient to sustain a finding of premeditation and deliberation include: "(1) facts about a defendant's behavior before the incident that show planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer a motive; (3) factors about the manner of the killing from which the jury could infer the defendant intended to kill the victim according to a preconceived plan." (Id. at p. 318, citing People v. Anderson (1968) 70 Cal.2d 15, 26-27.)

The factors in People v. Anderson, supra, 70 Cal.2d 15, are a guide, and they do not exclude other types of evidence that support a finding of premeditation and deliberation. Evidence of all three factors is not required to sustain a conviction, and the factors are not accorded any particular weight. (People v. Edwards (1991) 54 Cal.3d 787, 813-814, People v. Sanchez (1995) 12 Cal.4th 1, 32-33.) Here, however, there was evidence of all three Anderson factors. With respect to planning, the evidence showed that defendant had previously threatened to shoot Garcia if Garcia returned

to the reservation after the two had fought. On the night of the incident, defendant saw Moreno walking along the road; Moreno was wearing Garcia's sweatshirt, and was approximately the same height and weight as Garcia. Defendant mistook Moreno for Garcia. Defendant felt that he was being disrespected, and he drove by Moreno three or four times. Defendant became angry, and said he wanted to "[s]how him what the fuck I said." "I ain't no punk dude. I gotta' do, what I gotta' do. That's what I'm going to do." Defendant was armed with a shotgun. This evidence shows that defendant planned to murder Moreno, thinking he was Garcia.

With respect to motive, the evidence showed that Garcia had dated defendant's cousin and had treated her badly. Defendant and Garcia had fought, and after the fight, defendant threatened to shoot Garcia if he returned. This evidence shows that defendant had a motive to murder Garcia, although he mistook Moreno for Garcia.

With respect to the method and circumstances of the killing, the evidence showed that defendant drove past Moreno on the road three or four times. (See People v. Herrera (1999) 70 Cal.App.4th 1456, 1463 [the fact that the defendant made two passes by the apartment where he fired shots was sufficient evidence to show that attempted murders were deliberate and preconceived].) Moreover, defendant shot Moreno several times in the back at close range. (See People v. Ramos, supra, 121 Cal.App.4th at p. 1208

[stating that firing numerous rounds at an occupied vehicle showed that the shooting was purposeful so as to support the defendant's conviction of *attempted willful, deliberate and premeditated murder*].) We conclude the evidence amply supported defendant's conviction of first degree murder.

E. Constitutional Challenge to Sentence

Defendant argues that the 25-year-to-life enhancement for firearm use violates the constitutional prohibition against cruel and unusual punishment.

1. Federal Claim

Although the caption of his argument asserts that the enhancement violates the Eighth Amendment prohibition against cruel and unusual punishment, defendant has provided no analysis or citation to authority to support such a claim. We therefore conclude that defendant has waived this argument. (People v. Stanley (1995) 10 Cal.4th 764, 793.)

2. State Claim

"A sentence may violate the state constitutional ban on cruel and unusual punishment (Cal. Const., art. I, § 17) if '". . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."' [Citations.]." (People v.

Thongvilay (1998) 62 Cal.App.4th 71, 87-88.)

"In order to determine whether a particular punishment is disproportionate to the offense for which it is imposed, we conduct a three-pronged analysis. [Citations.] First, we examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society. A look at the nature of the offense includes a look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts. A look at the nature of the offender includes an inquiry into whether 'the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' [Citation.] Next, we compare the challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction. And finally, the challenged punishment is compared with punishment for the same offense in other jurisdictions.

"This three-pronged analysis provides guidelines for determining whether a punishment is cruel or unusual. The importance of each prong depends on the facts of each case. An examination of the first prong alone can result in a finding of cruel or unusual punishment. [Citations.] Regarding the other prongs, defendant bears the burden of proof. [Citation.]" (People v. Thongvilay, supra, 62 Cal.App.4th at p. 88.)

Here, under the first prong, defendant shot the victim from behind several times at close range; the killing was motivated by revenge because defendant thought he was killing Garcia, whom defendant had previously threatened to kill if he ever returned to the reservation. Few crimes are more serious than murder. With respect to defendant himself, we note that he had a prior criminal record and admitted to use of methamphetamine. His behavior after the shooting was callous – the evidence showed that he made no attempt to assist the victim, even though he told the officers that he realized that he had shot the wrong person when the victim was turning around. Instead, defendant picked up the shells, drove away, and spent the night watching television with his cousin. The next day, he jumped out a window and fled the

area when police cars arrived, and he remained at large for several months. We conclude that under the first prong, defendant's sentence did not violate the state Constitution.

With respect to the second and third prongs, as noted above, defendant bears the burden of proving that his punishment is more severe than that imposed for more serious offenses in this state and for similar offenses in other jurisdictions. Defendant has provided no analysis no these points, and we therefore do not consider them. We note, however, that in People v. Gonzales (2001) 87 Cal.App.4th 1, 16-19, and People

v. Martinez (1999) 76 Cal.App.4th 489, 496-497, the courts rejected similar challenges to 25-year-to-life enhancements under section 12022.53, finding that such enhancements did not constitute cruel and unusual punishment.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ P.J.

GAUT J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
NOV 1 2003
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.
RALPH MARTINEZ
Defendant.
Case No.: RIF 102923

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE STATEMENTS MADE BY DEFENDANT

(Evidence Code §402)
DATE:November 17, 2003, 0830 hrs.

- DEPT.: "62"

PLEASE TAKE NOTICE that on November 17, 2003, at the hour of 0830 AM or as soon thereafter as the matter may be heard in the courtroom of Department 62 of the above-entitled court, the defendant will move the court in limine for an order excluding statements made during the custodial interrogation, by the defendant, while intoxicated, because said statements were made involuntarily and thus inadmissible.
This motion will be based on the attached memorandum of points and authorities, and

on such oral and documentary evidence as may be presented at the hearing on the motion.

Dated:Law Offices of Barry O. Bernstein
Attorney for Defendant

Barry 0. Bernstein, Attorney at Law,
SBN#43230
Law Offices of Barry 0. Bernstein
3727 W. Magnolia Street, Box #767
Burbank, California 91505
(818) 558-1717 - Facsimile (818) 526-7672
Attorney for Defendant,
RALPH MARTINEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE - RIVERSIDE JUDICIAL

SUMMARY OF ARGUMENT

On or about July 27, 2002, defendant Martinez was taken into custody. Police Reports (Date Stamp 000215) indicate that officers "spoke" with the defendant and the defendant then admitted that he shot the victim.

The defendant is a resident of the Soboba Indian Reservation. At the time of the custodial interrogation, the defendant was intoxicated. At the time of the defendant's statements, the defendant was visibly intoxicated.

Accordingly, defendant's statements were not made voluntarily and knowingly, and therefore the introduction or reference to these statements is inadmissible.

Defendant submits the following points and authorities in support of the motion in Limine:

THE TRIAL COURT HAS DISCRETION TO MAKE EVIDENTIARY RULINGS PRIOR TO TRIAL

A trial court has discretion to rule on evidentiary matters prior to their actual admission into evidence. (California Evidence Code 402; People v Jennings (1988) 4 Cal 3d 963, 975, n 3, 251 Cal Rptr 278, 760 P2d 475.)

THE USE OF STATEMENTS STEMMING FROM A CUSTODIAL INTERROGATION OF THE DEFENDANT CONSTITUTE A VIOLATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION UNLESS THE PROSECUTION CAN DEMONSTRATE THAT THE PROCEDURAL SAFEGUARDS OF MIRANDA WERE HONORED

In Miranda v. Arizona (1966) 384 US 436, 444, 16 L Ed 2d 694, 86 S Ct 1602, the United State Supreme Court held that, "[T]he prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

An incomplete advisement of the defendant's constitutional rights under Miranda will render any subsequent statements and their fruits inadmissible. (People v. Banks (1970)2 Cal 3d 127, 133,84 Cal Rptr 367, 465 P2d

263.)Even if the accused initiates the conversation with the police after invoking his or her right to counsel, on further interrogation, the burden remains with the prosecution to establish that the accused has made a knowing and intelligent waiver of the right to an attorney [People v. Bradford (1997) 15 Cal.4th 1229, 1311,65 Cal.Rptr.2d 145, 93 P.2d 259]

THE BURDEN IS ON THE PROSECUTION TO ESTABLISH THAT A DEFENDANT'S WAIVER OF HIS MIRANDA RIGHTS WAS MADE VOLUNTARILY,_KNOWINGLY, AND INTELLIGENTLY

A defendant may waive his or her Miranda rights, provided the waiver is made voluntarily, knowingly, and intelligently. (Miranda v. Arizona (1966) 384 US 436, 444, 16 L Ed 2d 694, 86 5 Ct 1602.)

The determination of whether a waiver is "voluntary" is a separate determination from the question whether a waiver is "knowing" and "intelligent." The court must decide (1)whether the defendant made a free and deliberate choice to waive his rights and was not compelled to do so through police intimidation; and (2) whether the defendant waived his rights with full awareness both of the nature of the right being abandoned, and the consequences of his decision to abandon that right. (Colorado v. Spring (1987) 479 US 564,573, 93 L. Ed. 2d 954, 107 SCt 851.)

As the Supreme Court held in Moran v. Burbine (1986) 475 US 412, 421, 89 L Ed 2d 410, 106 S Ct 1135:

"First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both 0f the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived."

A DEFENDANT'S STATEMENT MAY BE INVOLUNTARY IF OBTAINED BY PSYCHOLOGICAL PRESSURES OR OTHER INVOLUNTARY EFFECTS -SUCH AS INTOXICATION

In Colorado v. Connelly (1986) 479 US 157, 167, 93 L Ed 2d 473, 107 S Ct 515, the United States Supreme Court held that a court must first find coercive police activity in order to determine that a confession is "involuntary" within the meaning of the due process clause.

"The test is whether the confession was 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." (Bram v. United States (1897) 168 US 532, 542, 543, 42 L Ed 568, 18 S Ct 183, as quoted in Malloy v. Hogan (1964) 378 US 17, 12 Ed 2d 653 84 S Ct 1489.) When the police use physical

violence to obtain a confession, the confession is per se involuntary. (Stein v. New York (1953) 346 US 156, 182, 97 L Ed 1522, 73 S Ct 1077.)
Other tactics that may render a confession involuntary are threats of violence (Payne v. Arkansas (1958) 356 US 560, 566-567, 2 L Ed 2d 975, 78 5 Ct 844), or promises of benefits or leniency (Hutto v. Ross (1976) 429 US 28, 30, 50 L Ed 2d 194, 97 S Ct 202).
The court must examine the totality of the circumstances to determine whether these activities rendered the confession involuntary. (Arizona v. Fulminante (1991, US) 113 Ed 2d 302, 111 S Ct 1246, L Ed 2d 472,111 S Ct 2067.)

The test is whether the specific tactics utilized by the police elicited the confession.(Miller v. Fenton (1986, CA3 NJ) 796 F2d 598, 60.)

CONFESSIONS AND ADMISSIONS THAT ARE THE PRODUCT OF CONSTITUTIONALLY DEFECTIVE SEARCHES AND SEIZURES ARE SUBJECT TO SUPPRESSION
The Fourth Amendment prohibits unreasonable searches and seizures, Incriminating statements obtained as a result of an illegal arrest are inadmissible and may be suppressed if nothing occurs to dissipate the taint of illegality. (Wong Sun v. United States(1963)371 US 471,488,9 LEd 2d441, 83S Ct407.)

"The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States, 365 US 505, 5 L Ed 2d 734, 81 S Ct 679, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of papers and effects.
Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. McGinnis v. United States (CA 1 NH) 277 F2d 598, Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the fruit of official illegality than the more common tangible fruits of the unwarranted intrusion." (Wong Sun v. United States (1963) 371 US 471,484-486,9 L Ed 2d 441, 485, 83S Ct 407.)

A DEFENDANT'S WAIVER OF MIRANDA RIGHTS DOES NOT PURGE THE TAINT OF AN ILLEGAL ARREST AND CONVERT THE STATEMENT INTO AN ACT OF FREE WILL
The Supreme Court has held that a defendant's statement following an unlawful arrest may be admissible if the statement was an act of free will sufficient to purge the taint of the unlawful arrest. (Wong Sun v. United States (1963) 371 US 471, 486, 9 L Ed 2d 441, 83 S Ct 407.) However, the Supreme Court has also held that the waiver

on Miranda rights alone will not purge the taint of the illegal arrest.
"Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made, subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standards of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' 371 US, at 486, 9 L Ed 2d 441, 83 S Ct 407."
Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests in the Fourth Amendment.

"If Miranda warnings, by themselves, were held to attenuate the taint of are unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted." (Brown v. Illinois (1975) 422 US 590, 601-602, 45 L Ed 2d 416, 95 S Ct 2254.)

CONFESSIONS AND ADMISSIONS THAT ARE THE PRODUCT OF ILLEGAL SEARCHES ARE SUBJECT TO SUPPRESSION
A confession or admission is inadmissible if it was obtained by confronting the defendant with or telling him about illegally obtained

evidence. (People v. Johnson (1969)70 Cal 2d 541, 549,75 Cal Rptr 401, 450 P2d 865,43 ALR3d 366.)
"However, where the acts intervening between the defendant's confession and the unlawful search have in fact been induced by the authorities' exploitation of the unlawful search, and where the confession was in fact induced by the authorities exploitation of those intervening acts, the road from the unlawful search to the confession, even if long, is straight, and adherence to the laudable policies underlying the exclusionary rule requires a conclusion that the confession is the fruit of the unlawful search. To hold otherwise would permit the authorities to profit from their unlawful activity and furnish an incentive for unlawful searches in violation of the Fourth and Fourteenth Amendments in the hope that the direct fruits of the search might be manipulated in such a way as to produce admissible evidence." (People v Johnson (1969) 70 Cal 2d 541, 549, 75 Cal Rptr 401, 450 P2d 865, 43 ALR3d 366.)

CONCLUSION
For the aforementioned reasons, counsel asserts that the statements made during the custodial interrogation, by the defendant, while intoxicated, were involuntarily made and thus inadmissible.

HIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX D

EVIDENCE TAPES

People v. Ralph Daniel Martinez, Jr.
RIF102923
Transcript of Interview Ralph Martinez
July 27, 2002
DR02099072/RSOH
Key:MOORE: Investigator Moore, Riverside Sheriffs Office- Homicide
MASSON:Investigator Lujan, Riverside Sheriffs Office – Homicide
MARTINEZ:Ralph Martinez, Defendant
(1st INTERVIEW)

(BEGINNING OF SIDE A)
MOORE:Investigator uh, Bruce Moore, Riverside County Sheriffs Department. The date is July 27, 2002. I'm here at the San Jacinto Border processing area. Case number DR02099072. I'm here to interview Daniel Martinez. Correction that'll be Ralph Martinez. (tape turns off momentarily)

MOORE:I got to read your rights, okay? 'Cause you've been in custody.
MASSON:_____they arrested you for being drunk down here?
MARTINEZ:I guess not for having no ID. I didn't have no ID.
MASSON:Oh
MARTINEZ:Yeah.
MOORE:Okay. Where's your ID at?

MARTINEZ:I don't know dude.
MOORE:You, (laughs), did you lose it down here or what?
MARTINEZ:No_ _____lost it I was waiting for it in the mail.
MOORE:Oh, you were waiting for one in the mail.
R-03-10-E
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 2
MARTINEZ:Yeah.
MOORE:Yeah. Well I hear ya'. Sometimes that happens. Running around you lose shit and wallets and so forth like that, okay. But since they've had in the hole. You know, I kind of got read you your rights.
MASSON:We're scheduled. Yeah except if...
MOORE: _____.
MASSON:...if they would have just, if they would've just say hey. Hang out here, you know. So the detectives could talk to you. I mean we wouldn't had a problem with that hut we're have to just kind of go through this whole thing. You know since they had you locked up, so.
MOORE:Is that cool?
MARTINEZ:Yes.
MASSON:All right.
MOORE:Okay. You have the right to remain silent. anything you say can and will he used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you

cannot afford to hire a lawyer one will be appointed to
represent you before any questions. if you wish one. Do you understand these rights as I've read them to you? With these right in mind do you wish to talk to me about that night?
MARTINEZ:What?
MOORE:I said with these rights in mind do you wish to talk to me about that night?
MARTINEZ:Um. (Laughs)
MOORE:No?
MARTINEZ:I don't even know what you're talking about dude.
R-03-10-E
People v. Ralph Daniel Martinez, Jr. —
Interview Date: July 27, 2002
Page 3
MASSON:Just a minute. Let me, let me spit. I'll be right back. Let me just; give me one minute here.
(Door closes)
MOORE:So you don't know what I'm talking about? Or you don't want to talk to me?
MARTINEZ:I don't know what you're talking about dude?
MOORE:Okay. Let's get it clear. Do you want to talk to me or not?
MARTINEZ:I don't even know what you're talking about dude.
MOORE:Yes or no?
MARTINEZ:I know what you're talking about. But I don't even know nothing about what you're talking about.
(Sounds like furniture scrapping across the floor)

MOORE:Do you want to talk to me or no?
MARTINEZ:I don't know.
MOORE:No? Okay.
MARTINEZ:I, I...
MOORE:All right. Well like I said that's why I say those are the; that's why we, we go through this, okay. And that's why I said you have your opportunity to tell me your side of the story.
MARTINEZ:Yeah.
MOORE:That's why I want to hear your side of the story. Okay? If you dont want to tell me your side of the story, like I said you'll have to let the chips fall where they may. Okay? That cool?
MARTINEZ:Cool dude.
MOORE:Okay?
R-03-10-E
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 4
MARTINEZ:Yeah. (Laughs)
MASSON:Well Ralph, you know something? You're in a, your, you're in a shitload of trouble, okay?
MARTINEZ:Am I?
MASSON:You know what you're being charged with?
MARTINEZ:No.
MASSON:You're being charged with murder. Okay?
MARTINEZ:Uh uh (negative).
MASSON:That's what you're being charged with, murder. Okay?
MARTINEZ:Yes.

MASSON:That's, that's why we're down here. Okay? We're getting all kinds of story's that put you on the crime. Okay, we have witnesses. We have physical evidence. Okay, you obviously know we went to your house.
MARTINEZ:Yes.
MASSON:Okay? You obviously haven't came in to talk to us on your own.Correct?
MARTINEZ:Yeah.
MASSON:Okay?
MOORE:You been running. I know that.
MASSON:You been running. You got...
MARTINEZ:No.
MASSON:You got into a pursuit with the cops not too long ago.
MARTINEZ:Did I?
R-03- 10-E
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 5
MASSON:
Well that's what they're telling us.
MARTINEZ:
Shit.
MASSON:
So all this, all this stuff...
MARTINEZ: I didn't even know that.
MASSON:
All this stuff is building against you.
MOORE:
I know you were out at the; I mean I already talked to everybody. Okay?
MARTINEZ:(Burps)

MOORE:
You have to understand that. And I've talked to everybody. Okay? I know you were in the house over in Wooloo's house over there. I know you ran out the window.
MARTINEZ:
(Laughs) Ha, ha, ha.
MOORE:
'Cause they all told me about that when we went did our search warrant there.
MASSON:
Okay.
MOORE:
Okay. So you know I know all this. All right?
MARTINEZ:Yeah.
MOORE:
That's...
MASSON:
So...
MOORE:
...what I say. I, I wouldn't be here. I'm, I'm not here by accident, okay? That's why I say, yoti know when you stand here and say I don't,..
MARTINEZ:_____.
MOORE:
...know what you're talking about, you know? I know...
MARTINEZ: I know too.

MOORE:...that ain't the case.
MASSON:Okay.
MOORE:Why 'cause you wouldn't be running...
MARTINEZ:You wouldn't...
MOORE:You wouldn't have been running for the last two and a half months. Okay? It's actually been longer than two and a half months.
MARTINEZ:I ain't been running dude.
MASSON:Well you hadn't come and talked to us.
MOORE:And you haven't come and collected your checks. Okay, what did you think, I fell off a bus here or what?
MARTINEZ:They're in my mailbox dude.
MOORE:No, they're not in your mailbox.
MASSON:No they're not, okay'? Obviously do, do you think we're just frickin' stupid guys here'? Okay?
MARTINEZ:Shit. I don't care dude.
MASSON:Okay, well you're gonna care when you're in prison.
MARTINEZ:Shit.
MASSON:Okay. That's what you're gonna care about.
MOORE:At, at that point then you're gonna sit there and go, gee whiz, whiz I wish I would've had my opportunity to talk to those detectives. Okay?
MARTINEZ:Oh yeah?

MOORE:Yeah.
R-03-10-E
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 7
MARTINEZ:(Chuckles)
MOORE:That's when it's gonna be too late. Okay and we're heading down that road right now. Okay? This is the last chance road. Once we cross this road then it's done. Okay?
MASSON:We just want you to know. That you know, this is not like a game here, okay'?
MARTINEZ:Yeah I know that.
MASSON:So.
MOORE:You, we're talking about your life. All right?
MARTINEZ:Oh, I know man.
MOORE:Your life. Not ours. Okay? We're gonna go home tonight and we're gonna go to bed and we're gonna sleep and we're gonna live normal life again. Okay you, and as you stand here and play stupid with me and insult me, okay'? Which is insulting to me, all right. Stand here and tell me oh, I been running, really? I didn't know that?
MARTINEZ:(Yawns)
MOORE:Okay? You don't think I haven't been on the phone to uh, you know Salgado and all those people out there and how they've held your checks. You don't think I don't know that? Who do you think arranged that? Who do you think arranged that Ralph? I did.
MARTINEZ:(Laughs)

MOORE:Okay. I made it happen. All right that's why you don't have your money.
MARTINEZ:Yeah.
MOORE:Okay.
MASSON:That's, that's...
MOORE:That's the bottom line.
R-03-10-E
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 8

MASSON:That's fine, so if you don't want to talk to us will just. We'll have to take you back to Riverside and we'll, we'll go from there, okay? Go ahead you're done. And we'll be done.
MOORE: Yeah. (Turns tape off)
(END OF SIDE A, END OF TAPE]

RO:db(temp)
R-03- I 0-E
0 1/16/2003
dh(temp)
Revised 01/22/2003
Revised 10/4/04
dkm

EVIDENCE TAPE
People v. Ralph Daniel Martinez, Jr.
RIF 102923
Transcript of Interview Ralph Daniel Martinez, Jr.
July 27, 2002
DR02099072/RSOH
Key: MOORE:Investigator Moore. Riverside Sheriffs Office - Homicide
MASSON:Investigator Lujan, Riverside Sheriffs Office Homicide
MARTINEZ:Ralph Daniel Martinez, Jr., Defendant
(2nd INTERVIEW)
(BEGINNING OF SIDE A)
MASSON:This is a recording of a uh, digital recorded interview with Ralph Martinez.
(Tape turned off momentarily)
(Police radio in background throughout interview)
MASSON:Ralph I know that you don't want to talk inside in the interview room. okay? But on the way back out here did you have a change of heart'?
MARTINEZ:I don't even, I don't know

MASSON:But, but before we're able to ask any questions. I'll have to read you your rights again. Here okay'?
MARTINEZ:Yeah.
MASSON:Because the first time you said you didn't want to talk to us.
But now you want to talk to us.
MARTINEZ:I guess.
MASSON:Okay? So let me read you your rights. again okay?
MARTINEZ:Yeah.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 2

MASSON:You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present while you're being questioned. If you can't afford one, one will be appointed to you before any questioning. Understand these rights?
MARTINEZ:Yeah.
MASSON:I, your... Yes?
MARTINEZ:Yes.
MASSON:Having these rights in mind do you want to talk to us?
MARTINEZ:Urn, I don't know I might.
MASSON:Well...
MARTINEZ:(Laughs)
MASSON:...see I, I can't ask, I can't ask you any questions.
MARTINEZ:Yeah, I'll talk to you.
MASSON:Okay.
MARTINEZ:Yeah.

MOORE:Well.
MASSON:And we'll, we'll talk more as we're, we're driving to jail.
MARTINEZ:Yeah.
MASSON: Well. I don't want to seem like this is a game or anything Ralph. I mean but...
MARTINEZ:Yeah.
MASSON:...these are serious charges.
MARTINEZ:I know dude.
R-03- 1 0-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 3
MOORE:It is a serious charge. And that's why I said we're not playing games and we didn't drive down here at four o'clock in the morning for nothing. Okay.
MARTINEZ:Yeah.
MOORE:Do you understand what I'm saying?
MARTINEZ:Yeah I understood.
MOORE:That's why I was sitting here saying you know, when you were sitting here laughing about it. And, and you know, acting like we're sitting here jerking your chain. We're not jerking your chain. Okay?
MARTINEZ:Yeah.
MOORE:I don't get a call at two o'clock in the morning because of nothing. Okay I've getting clock, uh call at two o'clock in the morning 'cause you're down here.
MASSON:So, so what do you want to talk about that night? Where were you?
MARTINEZ:Luck I was at Wooloo's. dude.
MASSON:You were at Wooloo's?
MARTINEZ:Yeah.

MASSON:Okay where's Wooloo's compared to your house?
MARTINEZ:Next door.
MASSON:Next door?
MARTINEZ:Yep.
MASSON:Okay. What time did you get there'?
MARTINEZ:Shit I don't about 7:30.
MASSON:7:30?
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 4

MARTINEZ: Yeah some, somewhere around there, dude.
MASSON: Okay. Well who was there?
MARTINEZ: Uh, Wooloo and some kid was there dude.
MASSON: Okay. You got, okay. Who else was at their house?
MARTINEZ: I don't... I don't even remember that chicks name right now, dude. Some chick though.
MASSON:Okay.
MARTINEZ:Some Mexican chick.
MASSON:Okay, some Mexican chick?
MARTINEZ:Yeah.
MASSON:She was there?
MARTINEZ:Yeah.
MASSON:Okay. And Wooloo the Mexican chick and who else?
MARTINEZ:Her kid.
MASSON:Huh?
MARTINEZ:(Laughs) Her kid.
MASSON:Her kid.

MARTINEZ: Heck yeah.
MASSON: How old's her kid?
MARTINEZ:I don't know. It's a baby dude.
MASSON: Okay. Uh, who else was at the house?
MARTINEZ: That's it.

R-03-10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 5

MASSON: That's it, and you?
MARTINEZ: Yeah.
MASSON: Of course. Okay. Uh. So you got there about 7 you said?
MARTINEZ:7:30 yeah, somewhere around there.
MASSON:7:30, okay? What'd you guys do?
MARTINEZ: What, nothing.
MASSON: What's that?
MARTINEZ: Nothing. The kid was there.
MASSON: Did you guys sit around in chairs and stare at each other? Did you guys watch TV or?
MARTINEZ: Something like that. (Laughs)
MASSON: Okay.
MARTINEZ: We just kicked it dude.
MASSON: Uh, what were you guys talking about?
MARTINEZ: Nothing.
MASSON: Nothing?
MARTINEZ: No. Nothing dude.
MASSON: Okay.
MARTINEZ: Just chilling dude.

MOORE: Okay, so you get there at 7:30. The only person that's in or the only two people are there. Is a some Mexican chick, you don't know her name.
MARTINEZ: No.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27. 2002
Page 6

MOORE: And Wooloo?
MARTINEZ: Yep.
MOORE: And that's it?
MASSON: Okay, so. So what happens?
MARTINEZ: We were chilling dude.
MASSON: Okay so you're chilling. How long you chilling for?
MARTINEZ: All night dude.
MASSON: uh?
MARTINEZ: I chilled all night.
MASSON: All night? So you were there all night long?
MARTINEZ: Yep.
MASSON: Okay. Uh, what time did you leave?
MARTINEZ: Shit the next day when the cops rolled up, (laughs).
MASSON: You left the next day?
MARTINEZ: Yeah.
MASSON: Okay. Uh. so, so you were there. So 7:30 until the next day?
MARTINEZ: Yeah.
MASSON: Okay. When did you leave the next day?
MARTINEZ: When the cops showed up.

MASSON: Why'd you leave when the cops rolled up?
MARTINEZ: 'Cause that shit was scary man. (Laughs)

People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 7

MOORE: We weren't at in Wooloo's house though?
MARTINEZ: No, but you were pretty damn close.
MOORE: Why, who else was there in the house when you left?
MARTINEZ: No one. Just me.
MOORE: No one else was at the house?
MARTINEZ: Just the same people.
MOORE: The same people?
MARTINEZ: Yeah.
MASSON:Why, why did you leave?
MARTINEZ: 'Cause that shit was scary dude.
MASSON:Why? What, what was scary about it?
MARTINEZ: Fuck, you guys rolled up there deep. I don't know.
MOORE: Well uh Wooloo and this Mexican chick leave?
MARTINEZ: I don't know. I don't know.
MASSON: Well how did you leave'?
MARTINEZ: I fuck out the window.
MASSON: Out the window?
MARTINEZ: Yep.
MASSON: Okay. Did you run'? Did you get on a motorcycle and take off?
MARTINEZ: No.

MASSON: Huh?
R-03-10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 8

MARTINEZ: Huh?
MASSON: Where'd you go?
MARTINEZ: Where did I go? I don't even know.
MOORE: You don't know where...?
MARTINEZ:I never got on a motorcycle.
MASSON: Okay. But you took off? You ran out the window.
MARTINEZ: Yeah.
MASSON: You jumped through the window or whatever?
MARTINEZ: Yeah.
MOORE: Do you remember where you went'?
MARTINEZ: Yeah.
MOORE: Where'd you go'?
MARTINEZ: I don't want to say though.
MASSON:Well why'?
MOORE: Were you in Riverside County?
MARTINEZ: Yeah. We were in Riverside County though.
MOORE: Okay.
MARTINEZ: Yeah, it wasn't too far.
MASSON: Okay. Where'd you end up going? I mean see Ralph this is just, be honest with us. I mean the other person's...
MOORE: Okay we're talking...
MASSON:...not in trouble or anything.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002

MOORE: Okay, we're trying to corroborate you story.
MARTINEZ: My sister's dude.
MOORE: Okay.
MASSON: You went to your sister's?
MARTINEZ: Yeah.
MASSON: Where, where's that?
MARTINEZ: On the other rez.
MOORE: Morrongo reservation'?
MARTINEZ: Yeah.
MOORE: You went there right after it'?
MARTINEZ: Uh, yeah.
MOORE: Okay. Okay.
MASSON: Okay. Ralph let, let me ask you a question here?
MARTINEZ: What's that?
MASSON: So you're saying the cops come up they didn't go to Wooloo's house.
MARTINEZ: And oh, they went right next door.
MASSON: I know. And you took off, I mean...
MARTINEZ: Yeah.
MASSON:Why?
MARTINEZ: 'Cause that's shit's scary dude.
MASSON: Well if you ...
R-03-I 0-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 10
MOORE: _____.
MARTINEZ: It's scary dude.
MOORE: If you have nothing to hide, why would you run?
MARTINEZ: I don't know dude.

MASSON: Huh?
MARTINEZ: I don't know dude, but that shit's just scary dude.
MASSON: But why would it be scary Ralph if just, if you have nothing to hide?
MARINEZ: I don't know dude.
MOASSON: Okay. Let's, let's, let's go back to the night you're at Wooloo's house right?
MARTINEZ: Yeah.
MASSON: Uh, you said you're all, all day right? Or all night?
MARTINEZ: Yeah.
MASSON: What kind of car you driving?
MARTINEZ: I ain't driving a car.
MASSON: Well, we got other people saying you are driving a car.
MARTINEZ: They lied.
MASSON: Okay, why would they do that?
MARTINEZ: I don't know dude,
MASSON:_____ car.
MARTINEZ:I don't know.
MASSON:I didn't say you had a car I said you were driving a car.
R-03-1 0-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 11

MARTINEZ:No. (Laughs)
(Ongoing background traffic noises)
MASSON:You weren't driving, you weren't driving uh, let me _____. You weren't driving, I mean your brother's car?
MARTINEZ:No.
MASSON:Okay. Are you sure about that Ralph?

MARTINEZ:Yeah.
MOORE:I went up to see
_____ _____ you know I talked to your sister and your sister said you didn't go there.
MARTINEZ:_____ cover my ass though.
MOORE:She's just trying to cover your ass?
MARTINEZ:Yeah.
MARTINEZ:Okay.
MASSON:Why would she be doing that Ralph'?
MARTINEZ:I don't know, think she's like that.
MASSON:_____she? Why would she he lying to us?
MOORE: _____talk to you _____.
MARTINEZ: She don't want nothing to do with it then.
MOORE:Huh?
MARTINEZ:She don't want nothing to do with then.
MOORE:She won't have anything to do with it?
MARTINEZ:Yeah, that's probably it.

MOORE:And how long did you stay at your sister's?
MARTINEZ: For a minute dude.
MOORE: Just for a minute?
MARTINEZ: Yeah.

MOORE:So, where did you go then?
MARTINEZ:Down to my house.
MOORE: Down to your house?
MARTINEZ: _____.
MOORE:You went down to your house —
_____?
MARTINEZ:Yeah.
MOORE:You know I've been to your house and you weren't there.
MARTINEZ:Yeah. I been there though. Yeah.
MOORE:I know you've been there. But you weren't there when I been there.
MARTINEZ: Oh, I know.
MOORE: I've been there quite a bit.
MARTINEZ:Yeah.
MOORE:But you weren't, you weren't there at the house. So where else did you go?
MARTINEZ: I been around dude.
MOORE: Where'?
MARTINEZ: Fuck everywhere dude. Cruising, partying_____.
MASSON: Ralph if you knew the cops wanted to talk to you?
R-03-10-F 00038~
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 13

MARTINEZ:Uhn hnnnnn (affirmative)
MASSON:Why didn't you, why didn't you come and talk to us?
MARTINEZ:'Cause I don't like cops dude.
MASSON:Why not? Why?
MARTINEZ:'Cause they put everybody in jail.
MASSON:Well they only put people in jail that you know...

MOORE:That break the law.
MARTINEZ:Yeah.
MOORE:Okay, that's the only reason why we, we uh, we do. If you are uh, living a normal life and you're going out and partying and so forth like that. Do you think I'm gonna' stop you?
MARTINEZ:Fuck I don't know, you just did.
MOORE:Well, I stopped you for another reason, okay?
MARTINEZ:Yeah.
MOORE:Here, here's the scheme Ralph, okay? You know I have people that witnessed you. Okay? Leaving he location, okay?
MARTINEZ:Yeah.
MOORE:In Dumbo's van, okay?
MARINEZ: Yeah.
MOORE:I have your uncle telling me that you came home, okay?
MARTINEZ: Yeah.
MOORE: Telling him that you shot the wrong person.
MARTINEZ:Oh Fuck...
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 14

MOORE:Okay.
MARTINEZ Yeah.
MOORE: And I know that it was the wrong person. Okay?
MARTINEZ: Yeah.
MOORE: And that's why I told you that I thought it was an accident. Okay?

MARTINEZ: Yeah.
MOORE: Because you; I know the bad blood you had with, with Richard. Okay?
MARTINEZ: Yeah.
MOORE: I know the; about the fights.
MARTINEZ:Yeah.
MOORE: I know about the threats. I know about all that because Richard's an ass.
MARTINEZ: Yeah.
MOORE: Okay? Right?
MARTINEZ: ...he's a punk anyways...
MOORE: Yeah he is a punk. I know that.
MARTINEZ: Fuck up_____.
MOORE: Okay you're not tell...
MARTINEZ: The _____.
MOORE: You're not telling me anything I don't know.
MARTINEZ: (Laughs)
MOORE: I know Richard. All right?
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 15

MARTINEZ:Yeah.
MOORE: I met... You know when I met Richard? I met; I had a murder out there a month before. And I met him then.
MARTINEZ: Um hmm (affirmative)
MOORE: And he was a punk then and he's a punk now.
MARTINEZ: Oh, he's still a punk though _____.
MOORE: Okay?
MARTINEZ:(Laughs) Ha, ha, ha, ha.

MOORE: That's what I say, he's still a punk now. Okay?
MARTINEZ: _____.
MOORE: And that's why I say these things, I didn't end up here by accident.
MARTINEZ: Yeah.
MOORE: That's why I know that, that...
MARTINEZ:I been knowing this.
MOORE: Huh?
MARTINEZ:I been knowing.
MOORE: So that's why I'm sitting here going, you know. I, I know that it was intended for, for E.T. as you guys called him.
MARTINEZ: Yeah.
MOORE:Right?
MARTINEZ: Fuck yeah, I guess. ..
MOORE: But when you pulled up you didn't recognize him, right?

R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 16

MARTINEZ: I don't know dude.
MOORE: Did you recognize him? No. You didn't recognize him. Right?
MARTINEZ:(Laughs)
MOORE: I mean it was the fucking wrong person.
MASSON: You know Ralph if it was an accident. It's an accident, you know what I mean
MARTINEZ:Yeah.
MASSON: We could deal with that. But we can't deal with, with your lying.

MARTINEZ:Yeah.
MASSON: Okay? 'Cause we have more than enough people telling us that you're the one who shot him.
MARTINEZ: Yeah.
MASSON: Okay?
MOORE: That's, that's my point. Is my point is, is if you know if; that's why I say, I... I've got enough information from what everybody's told me.
MASSON: Okay, we even have, we even have your own family telling us what you did that night. Okay?
MARTINEZ: Yeah.
MOORE: So, and I know that, I know that, I know that that kind of you know, must upset you. A little bit. But the truth is the truth, and like I said you know there is only one truth. There isn't a multiple of truths all right?
MARTINEZ:Yeah.
MOORE:So this, this bad blood you had between you and uh Richard started because she was uh, uh, Wooloo was getting heat up by him?
MARTINEZ:All kinds of shit dude. He's just fucking up.

R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 17

MOORE: Didn't like him very much though right?

MARTINEZ:Naaah...
MOORE: Do you remember that fight you guys got into about a month beforehand?
MARTINEZ: Yeah.
MOORE: Who, who ended up winning that fight?
MARTINEZ: Fuck, me!
MOORE: You did?
MARTINEZ: Fucking A, dude. He couldn't kick my ass. You seen him. (Laughs) Ha, ha,
MOORE:He's a rail, he's a little rail of a guy, yeah I know.
MARTINEZ:Yeah.
MOORE:_____ you know.
MARTINEZ:He was running so much.
MOORE:He was running so much?
MARTINEZ:(Laughs) uh, uh, yeah.
MOORE:So when you were done with the fight you told him never to come back out there again, right? That he had no business out there?
MARTINEZ:Well, uh something like that.

MOORE:Yeah. Did he listen to you?
MARTINEZ:Fucking no.
MOORE:Why not?
MARTINEZ: Thought I was a punk.

R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 18

MOORE: He disrespected you?
MARTINEZ: Thought I was a punk.
MOORE: Is that what he told you?
MARTINEZ: No, but I know that's what he's thinking.
MOORE: He was thinking that you were a punk?
MARTINEZ:Yep.
MOORE: Well he was wrong wasn't he?
MARTINEZ: Yep. (Laughs)
MASSON: Ralph if, if it was you know, someone else was wearing the guys clothing and you thought it was him or something like that. And you had bad blood with him. That ain't no biggie, you know what I mean?
MARTINEZ: Yeah.
MASSON:But the thing is, I mean if it comes down to it you know. Hey, you know you had, bad blood against this guy. You didn't know, you didn't know you know the guy who got shot. It was you know, hey it was an accident. But I, I want you to be man enough to at least tell us, you know. Don't let all your family...
MARTINEZ:What someone looked like him?

MOORE:Did it look like him?
MARTINEZ:(Laughs) Ha, ha, ha. It looked like Richard. Fuck.

MOORE: Well you know what, they look alike. When you look at 'em in a photo, it's the same...
MARTINEZ: _____.
MOORE: They look alike.
MARTINEZ:Huh.

MOORE: Yeah. Yeah, I, I buy that one. So did you just see him walking down the road?
MARTINEZ: Yeah. I drove by him like three or four times.
MOORE: Three or four times?
MARTINEZ: Yeah.
MOORE: Yeah, I don't, I don't uh. Like I said I don't blame you far not liking Richard, okay'?
MARTINEZ: Yeah.
MOORE: I don't like Richard either.
MARITINEZ: He's a fucking high _____. He's just a
MOORE: ____
MARTINEZ:Yeah.
MOORE: Okay, well that's cool. What'd you end up doing with the uh, gauge?
MARITINEZ:I don't even know dude.
MOORE: You don't remember'?
MARTINEZ :No.
MOORE:But you didn't give it to your uncle though, right?
MARTINEZ:No, I was so fucked up that night dude. I don't even know.
MOORE: What were you using speed that

night?
MARTINEZ: Yeah, I was fucked up dude. I was like in a fucking slum with that.
MOORE:Were you drinking too?
MARTINEZ: No.
R-03-10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 20

MOORE: No, just using speed?
MARTINEZ: I guess dude.
MOORE: How much did you use'?
MARTINEZ: Fuck, straight up dude. I'll smoke all I can.
MOORE: All you can? You do?
MARTINEZ: Yeah, I used only use...
MOORE: Oh, do you use daily'?
MARTINEZ: Yeah.
MASSON: Ralph let me ask you a question? Uh, how many times did you shoot him?
MARTINEZ: Huh?
MASSON: How many times did you shoot at him?
MARTINEZ: I don't even know dude.
MASSON: How many times do you think you shot at him?
MARTINEZ: Shit I don't even know.
MASSON: Once?
MARTINEZ: I don't know.
MASSON: You don't know? I mean I gotta know did the gun go off one time?

MARTINEZ: Hey on the_____ though dude. I was so fucked up I don't even know what the fuck was going on dude.
MASSON: Okay. But, but you drove by him a couple of times.
MARTINEZ: Yeah.
MASSON: That night?

MARTINEZ: Yep.
MASSON: Okay.
MOORE: And you were thinking that, here's a guy that was thinking it's...
MARTINEZ: I go what the fuck back down this punk.
MOORE: He didn't respect... And you told him that to never come back.
MARTINEZ: Yep.
MOORE: Otherwise you were gonna fucking shoot his ass.
MARTINEZ:Um hmm (affirmative)
MOORE:Right?
MARTINEZ: Um hmm (affirmative)
MOORE: So that's why I said and he obviously didn't, he didn't respect what you told him.
MARTINEZ: Nope. That guy's a punk.
MOORE: So pretty much you were gonna show him what, what was what?
MARTINEZ: Yep. Show him what the fuck I said.

MOORE: In effect basically you back up what your, what word you're, what you were saying.
MARTINEZ: Huh.
MOORE: So.
MARTINEZ:I ain't no punk dude. I gotta do. what I gotta do. That's what I'm gonna do.
MOORE: Well that's, that's; you know that somebody that carries out what they're gonna' say. Okay? Basically.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 22

MARTINEZ: Yeah.
MOORE: You know.
MARTINEZ: I heard you guys got my cousin too?
MOORE: Huh?
MARTINEZ: Did you guys, did you let me cousin go?
MOORE: Your cousin?
MARTINEZ: Yeah.
MOORE: Uh, is that Nathan?
MARTINEZ: Yeah.
MOORE: Uh, yeah he's gone.
MARTINEZ: Yeah. Both of 'em'?
MOORE: Yeah.
MARTINEZ :All right.
MASSON:What you tell 'em?
MOORE:They know you were wanted'?
MARTINEZ: I don't know everybody been telling me the cops are looking far me.
MOORE: (Laughs).

MARTINEZ:(Chuckles)
MOORE: Did you tell 'em what happened'?
MARTINEZ: No. Shit I don't even know what happened how could I tell them dude?
MOORE: Well I mean you kind of know what happened?
R-03-10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 23

MARTINEZ: I don't know dude, fuck yeah. That shit was scary.
MOORE: Oh, I'm sure it was scary.
MARTINEZ:(Laughs)
MOORE: I mean but you were pissed off that this guy disrespected you. Okay and thought that you were a punk and thought, thought that you weren't; that you know that he wasn't taking your word serious right?
MARTINEZ:I guess.
MOORE: So from that standpoint like I said, you know. You just were carrying out what you said.
MARTINEZ: Ow.
MOORE: You might, but you don't remember what happened'? You don't remember how many times the gun went off?
MARTINEZ: No.
MOORE: Do you rem, do you remember what you did with the gun?
MARTINEZ: No.
MOORE: You don't remember'?
MARTINEZ: Uh uh (negative), dude. I kind of like flipped out.
MOORE: Well _____.

MASSON: Ralph, Ralph could it have been that you were maybe you were just angered? You know how people get that rage in 'em?
MARTINEZ: I don't know dude.
MASSON:You know.
MARTINEZ:Dope kills a lot of shit.
MOORE:(Chuckles)
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 24
MARTINEZ: (Laughs)
MOORE:Well that's, that's, that's cool. I understand that.
MARTINEZ: Yeah.
MOORE:And you know when people are under the influence they do sometimes things that ain't would normally_____
MARTINEZ: Normally wouldn't.
MOORE: Do you think you would've done this if uh, you weren't using speed?
MARTINEZ: Fuck no. Fucking stupid shit like this. What the fuck was I thinking.
MOORE:Well you were thinking that he disrespected you, that's what you were thinking, right?
MARTINEZ: Uh huh (affirmative), what the fuck is that? That's nothing dude. What was I thinking? Who gives a fuck what a little punk does anyways man? Fucking little hype need. _____ .
MASSON:Hey Ralph, what'd you, what'd you, what'd you feel when you found out it was the wrong guy'?

MARTINEZ: I don't even know dude. I don't even know what you're talking about. (Laughs) Ha, ha, ha.
MASSON:All right.
MARTINEZ: No but I don't know dude.
MASSON:I mean no real, really what were you _.
MARTINEZ: Fucked up all you all.
MOORE: Bullshit you shot the wrong guy.
MARTINEZ: I fucked up dude.
MOORE: You shot the wrong guy, hey.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 25

MARTINEZ: That's fucked up man.
MOORE: That's fucked up.
MARTINEZ: Oh _____
MOORE:Well are you upset about that'?
MASSON: But it, but it...
MARTINEZ: Yeah kind of. Actually kind of hurts dude.
MOORE: Did you know, did you know Daniel?
MARTINEZ: No. I didn't _____
MOORE: You didn't know him at all?
MARTINEZ: No.
MOORE: You had no, no contacts with him?
MARTINEZ: No. I didn't even know who that fool is.
MOORE: So how long after did you find out you shot the wrong guy'? Who told you? Wooloo tell you'?
MARTINEZ: No. (Laughs) Ha, ha, ha, yeah.
MOORE: Yeah, Wooloo did?

MARTINEZ:Yeah, Wooloo said that some guy named Daniel got shot.
MOORE: And you said no fucking way, it was E.T.?
MARTINEZ: I said no shit. She said yep. I was like, man. Fucked up.
MASSON: So one _____.
MOORE: It's one thing if you're going out to; that's why I say it's one thing if you're going out to, to take care of business with one dude, right? And it turns out to be the wrong guy.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 26
MARTINEZ:Well that's some fucking hollywood movie shit.
MOORE: Yeah.
MARTINEZ: Ain't it?
MOORE: Yeah.
MARTINEZ: Ain't it though'?
MOORE: Yeah exactly.
MARTINEZ: That's some hollywood movie shit.
MASSON: She's waiting for you Bruce. Let's go back inside. Ralph we all make mistakes.
MARTINEZ:I know this is the one I'm gonn' have to get over.
MASSON:Well...
MARTINEZ: I'll do about ten years probably'?
MASSON:I don't know.
MARTINEZ: Huh?
MASSON: I don't know.
MARTINEZ: More than that'?
MASSON:I don't know that's you know.

MARTINEZ: Fuck I hope not dude.
MASSON: We put the case together and we give it to the DA's office.
MARTINEZ: You can't recommend the time?
MASSON: Well. yeah ____.
MARTINEZ: You dogs have it._____(Laughs)

R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 27

MOORE:_____.
MASSON:Watch.
MARTINEZ:Shit so my stupidity and I'll never do it again.
(Car door closes)
MASSON:Well it happens, it happens. You know what I mean?
MARTINEZ: Yeah.
MASSON: But you know, my thing is I, I think you're, you're telling us the truth here. I think you're kind of bouncing around okay? You're telling us yeah, I shot the guy. But how many times did you shoot him?
MARTINEZ: I don't know dude.
MASSON: Well look it _____
MARTINEZ : I was, I was fucking so fucked up that night I don't even remember. Probably 'cause I blocked it out too, though.
MOORE: Okay. Do you, do you remember what you did after you shot him?
MARTINEZ: Fuck I went crazy dude.
MOORE: I mean what's crazy? Just...

MARTINEZ: Crazy dude. I went crazy dude_____, yep.
MOORE: Did you walk up to him and see that it was the wrong guy?
MARTINEZ: Well. I don't know dude. (Laughs)
MOORE:_____see?
MARTINEZ:Yeah.
MOORE: Yeah you did'?
MARTINEZ: Yeah.
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 28
MOORE: That's was pretty upsetting huh?
MARTINEZ: Yeah. I sure fucked up dude.
MOORE: That when you figured it out how long afterwards?
Immediately afterwards, after you walked up to him?
MARTINEZ: Yeah. Yep.
MOORE: Do you remember how far away you were standing when you shot? I mean were you pretty far away?
MARTINEZ: I was close dude.
MOORE: Was; did he have his back turned to you or was he facing you?
MARTINEZ:No, he turned around.
MOORE: He turned around after you shot him?
MARTINEZ: It was like the same time the bullshit.
MOORE: Like same time? And then, aw shit I shot the wrong guy?
MARTINEZ: Yeah.

MASSON:So you were at Wooloo's house that night then?
MARTINEZ: Yeah.
MASSON: And then; why, why don't we go through this whole thing so I kind of; I,I, I'm kind of losing you here. So where, you're at Wooloo's house,
right? Then what happens from there?
MARTINEZ: I chilled dude.
MASSON: Okay.
MARTINEZ: I chilled.
MASSON: You killed?
R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 29
MARTINEZ:I chilled.
MASSON:Oh, chilled, okay.
MARTINEZ: Yeah I was trying to get some leg.
MASSON: Okay. So what, what happens? What, what brings you with this guy? Was he at Wooloo's house too or was he just walking down the street and you thought it was E.T.?
MARTINEZ: Yeah. Pretty much I'd say right there.
MASSON: Okay and then what happens?
MARTINEZ: I don't know dude. It's kind of like a blurr. I don't even know.
MOORE: So you... Let's, let's back up a little bit here. Do you remember borrowing your uncle's van?
MARTINEZ:Yeah, I was gonna get some shit.
MOORE:You were gonna go get some motorcycle parts, right?

MARTINEZ: No, some shit.
MOORE: Oh, some shit. You told him you were gonna get...
MARTINEZ: Shit.
MOORE:...motor, motorcycle parts but you went and got some shit.
MARTINEZ: Yep.
MOORE: Okay.
MARTINEZ: I got all twacked out and I don't even know after that.
MOORE: So that's when you came back and you're driving up and down on the road. And you see who think, thought was E.T., right?
MARTINEZ:Yep.

R-03- 10-F
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27, 2002
Page 30

MOORE:But you had, you had your shit with you or did you go back to your house to get the gun'?
MARTINEZ: I don't, (sighs). I think I want to talk to my lawyer dude. I want to talk to a lawyer first.
MASSON: Okay.
MOORE:Okay.
MARTINEZ:'Cause I don't know what's up dude.
MOORE:All right.
MASSON:Okay.
MARTINEZ: Do you know what I mean'?
MASSON:Okay. Well at least your honest with us.
MARTINEZ:Yeah.

MASSON:Thanks for being honest with us and I could appreciate it.
MARTINEZ:I ain't gonna lie dude. That's one thing I don't do.
MASSON:Okay. Thank you.
MARTINEZ:Yeah.
MASSON:You know.
MARTINEZ:I can't lie. I don't know how to lie that's why.
MASSON:Okay. But you told us your version and I appreciate that. Now if
you want to talk to an attorney that, that's fine. Okay.
MARTINEZ:Oh, I hear ya'.
MASSON:Okay.
(Background 'beeps')

R-03-10-I"
People v. Ralph Daniel Martinez, Jr.
Interview Date: July 27,2002
Page 31
(Recording is turned off)
(END OF SIDE A, END OF TAPE)
RO:db(temp)
R-03- 10-F
01/16/2003

Revised 01/22/2003 db (temp)
Revised 10/4/04 dkm